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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE
ASSOCIATED BUILDERS & CONTRACTORS, INC.

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit misinterpreted this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) by concluding that it authorized imposition of top-down organizing restraints upon third parties whenever the restraints are imposed in the context of a collective bargaining relationship.

2. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the construction industry proviso to 8(e) immunizes all subcontracting restraints imposed in the context of a collective bargaining relationship.

3. Whether Congress intended to confine the scope of the construction

industry proviso of 8(e) to those circumstances where there was potential for job-site friction between union and non-union workers.

4. Whether the Ninth Circuit misinterpreted this Court's holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967) by promulgating a mixed motives test.

5. Whether the Ninth Circuit should reconsider its holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967) which held that a primary-secondary litmus test was to be employed to determine the lawfulness of a subcontract clause.

6. Whether 8(b)(7)(C) may be applied to prohibit organizational or recognitional picketing solely where a 9(a) election could be conducted.

7. Whether the United States Court of Appeals for the Ninth Circuit

erred in holding that an otherwise lawful subcontracting clause may be forcefully imposed through economic action upon an employer.

LIST OF PARTIES

PACIFIC NORTHWEST CHAPTER OF THE

ASSOCIATED BUILDERS & CONTRACTORS, INC.

NATIONAL LABOR RELATIONS BOARD

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED

GENERAL CONTRACTORS OF AMERICA, INC.

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 701

WOELKE & ROMERO FRAMING, INC.

CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO

CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE
ASSOCIATED BUILDERS & CONTRACTORS, INC.
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, denying

petitioner's petition to review an order of the National Labor Relations Board.

OPINIONS BELOW

Only the slip opinion of the limited en banc panel of the Court of Appeals for the Ninth Circuit has been published. (Pet. App. A, pp. A1 - A 111). The opinion of the panel of the Court of Appeals for the Ninth Circuit is reported at 609 F.2d. 1341 (1979) (Pet. App. B, pp. A 112 - A 146). The decision and order of the National Labor Relations Board is reported at 239 NLRB No. 43 (Pet. App. C. pp. A-146 - A-186).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered

and filed on the 17th day of April, 1981. The jurisdiction of this Court is invoked under 28 USCA 1254 (1).

STATUTES INVOLVED

The relevant provisions of Sections 7, 8(a), 8(b), 8(e), 8(f) and 9(a) of the National Labor Relations Act, as amended (61 Stat, 136, 73 Stat, 519, 29 USC §§ 151 et seq) are set forth in Appendix D. (Pet. App. D, pp. A-183 - A-186).

STATEMENT OF THE CASE

A. Procedural Background.

The Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein referred to as "Petitioner") filed charges on April 26, 1977, against the International Union of Operating Engineers,

Local Number 71 (herein referred to as "Engineers"), and the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., (herein referred to as "AGC"). The charges alleged that the Engineers and AGC entered into an agreement containing a clause which prohibited subcontracting to all non-signatory employers and that such clause violated Section 8(e) of the National Labor Relations Act. General Counsel's Office issued a complaint; the parties stipulated to the facts; and the matter was transmitted directly to the Board for decision.

Amicus curiae briefs were filed with the NLRB by the American Federation of Labor and Congress of Industrial Organizations, the Building & Construction Trade Department, AFL-CIO, and the Chamber of Commerce of the United States of America. The NLRB consolidated three other

cases arising in other parts of the country[1] and heard an "unprecedented" six hours[2] of oral arguments.[3]

On November 13, 1978, the NLRB rendered its decision and order in this and the related cases. It held that subcontracting clauses were immunized from 8(e) scrutiny by reason of the construction industry proviso. It further held that

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[1]Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.), 239 NLRB No. 41 (1978); Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates), 239 NLRB No. 42 (1978); Carpenters Local No. 42 (1978); Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL--CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL--CIO (Woelke & Romero Framing, Inc.), 239 NLRB No. 40 (1978).

[2]1978 BNA Labor Relations Reporter Yearbook.

[3]Permission to present oral argument, as amicus curiae, was granted to the Chamber of Commerce of the United States, the American Federation of Labor and Congress of Industrial Organizations, the Building & Construction Trades Council, AFL-CIO, and the Laborers International Union of North America, AFl-CIO.

such provisions may not be enforced through self help.

Petitioner filed its petition with the United States Court of Appeals for the Ninth Circuit (herein "Court of Appeals") for review of this decision and order as did AGC and the Engineers and the Board cross-petitioned for enforcement.

The Court of Appeals consolidated, for purposes of oral argument and decision, the proceeding brought by the petitioner herein with Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke & Romero Framing,

Inc.), 239 NLRB No. 40 (1978).[4] A three-judge panel of the Court on December 26, 1978, held that the subcontracting clauses were not protected by the construction industry proviso to 8(e) and were therefore unlawful.

Thereafter, the NLRB and the Engineers petitioned for rehearing en banc. The Court granted this motion and ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1632 and Rule 25 of the Court.

On April 17, 1981 the Court of Appeals rendered its opinion and entered

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[4]The Court granted motions on behalf of the Chamber of Commerce of the United States of America, the Air Conditioning and Refrigeration Institute, Air Movement and Control Association, American Boiler Manufacturers Association, American Consulting Engineers Council, Architectural Woodwork Institute, National Soceity of Professional Engineers, National Woodwork Manufacturers Association, Inc., and of the Associated General Contractors of America, Inc. to file briefs as amicus curiae.

judgment affirming the decision and order of the NLRB.

B. Facts.

Preliminary Remarks.

The parties filed a stipulation of facts with the NLRB. As will subsequently appear, it is the effect to be given to these facts which raises the issues presented here.

The Parties.

AGC is an association of employers engaged in all types of construction in the states of Oregon and five counties of southwest Washington. (R. 28). The employer members delegated their collective bargaining authority to AGC for the purpose, inter alia, of negotiating and entering into collective bargaining contracts on behalf of its employer members. AGC has approximately 200 member contractors.

Engineers are a labor organization which represent individuals in the construction industry who perform work contractually defined under various labor agreements, including that with AGC. Its jurisdiction is generously defined by the collective bargaining agreement as follows:

> "assembly and/or disassembly in the operation of all equipment within the jurisdiction of the union, regardless of its use or whether such equipment is mechanically, electrically, electronically, hydraulically, automatically or remotely controlled."

It extends to all heavy highway work, building work and also to off-site work at quarries, asphalt plants, etc.

Petitioner is an organization of contractors whose members are both union and non-union. One of its organizational purposes is to extend the concept of merit shop, i.e., the opportunity of union and non-union contractors to bid upon and work

on jobs based exclusively upon price, quality and service and without discrimination of any sort.

The Contract.

The Collective Bargaining Agreement contains the following provisions:

"ARTICLE VIII

Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

"* * * * * *

ARTICLE IX

Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article,

unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

> Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement." (Tr. 29).

> A subcontractor was deemed to refer:

> "* * * to any person, firm or corporation who agrees with, orally or in writing, to perform or who, in fact, performs for, or on behalf of, an Employer any part or portion of work covered by this Agreement." (R. 45).

The agreement required AGC, and all other signatory employers, to acknowledge Engineers as the sole and exclusive representative of employees covered thereunder; and compelled all employees to become members of the union not later than the eighth day following commencement of employment or be terminated (R. 48).

REASONS FOR GRANTING THE WRIT

A. Introductory Statement.

The Court of Appeals held that it was proper for an association of general contractors and a construction industry union to enter into a collective bargaining agreement which prohibits signatory general contractors from doing business with non-union and wrong[5] union contractors. It concluded that such agreements are lawful so long as there is a collective bargaining relation between the signatory employer and the union.

The construction industry is sui generous. Congress recognized its differences in a variety of statutory fashions. It was not Congress' intent, however, to give any greater shelter from

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[5]Employers who have been required to enter into a collective bargaining agreement with a different union pertaining to the particular work.

the prohibitions of 8(e) than those differences required.

The effect of the decision is to vest a brutal top-down organizational tool in the hands of construction industry unions. The decision will have the overt and obvious effect of depriving employees of their rights under Section 7 to "refrain" from collective bargaining activities; constitute a significant impediment to exercise of their electoral rights as granted under Section 9; frustrate the congressional intent in enactment of 8(f); add additional fuel to the already spiraling inflationary cost of construction work; and emasculate this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) (herein "Connell").

The difference between the construction industry and industries

generally do not suggest, let alone compel, the decision reached by the Court of Appeals. As will be demonstrated hereinafter the Court of Appeals should have adopted the principles enunciated by this Court in Connell.

B. The Court of Appeals Decision Conflicts with this Court's Connell Decision.

In Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) hereinafter referred to as "Connell", this Court reviewed the scope of the Section 8(e) construction industry proviso. In that case the union sought to impose a restraint upon the right of the employer to freely contract with whom it chose despite the fact that the employer neither employed any employees and the union expressly disclaimed any representational interest.

This Court properly recognized that the language of the proviso was not to be read literally and therefore made a meticulous examination of the legislative history. It held that subcontracting restraints, of any nature, are lawful only when necessary to carry out the congressional purpose expresed in the proviso.

The Court concluded that there were two critical and sometimes competing factors that must be juxtapositioned and balanced in order to ascertain the scope of the proviso.

First, the Court considered the important Section 7 rights of employees to self organization and collective bargaining and their correlative right "to refrain from any and all of such activities." It held that there was an overriding congressional purpose to interdict top-down organizing techniques of labor organizations which

frustrate employees in their effort to exercise their statutory right to "refrain."

Second, the Court found that Congress recognized that the construction industry is different than industries generally. It pinpointed the fact that employees of different employers are thrust together on common jobsites for short periods of time. Congress and this Court hypothesized that unless a contractor were permitted to voluntarily restrain, through agreement with the Union, subcontracting to non-union contractors, that the potential for jobsite friction could cripple the industry. It was solely this concern, that of potential jobsite friction, upon which Congress focused.

In Connell, this Court struck the balance against the exercise of Section 7 rights when jobsite friction was possible. When such friction was not possible, the balance necessarily fell sharply on the other side. In consequence, the Court

concluded that any subcontracting clause was broader than the exigency its statutory prop prop would support must be found to violate 8(e).

The underlying principles of Connell have been violated by the Court of Appeals decision. The subcontracting clause here applies without regard to the purposes underlying the proviso, i.e. there are innumerable circumstances when jobsite friction could not occur and yet the clause would be held to apply.

The Ninth Circuit sought to prop its departure from Connell upon a nonexistent foundation.[6] It was compelled to recognize that the top-down organizing

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[6]The Ninth Circuit was concerned that it was departing the Connell guidelines. This concern is sprinkled throughout its opinion. For example, it states:

> "We can see that the language of the Connell opinion dealing with congressional antagonism to top-down organizing may well lean in a direction contrary to our own views."

through a subcontracting restraint was condemned by this Court in the absence of a collective bargaining relationship. It concluded that the protection of 8(e) was granted in such circumstances because the employer had no 8(b)(7)(C) protection. The Court of Appeals hypothesized that since an employer who had a collective bargaining relationship is entitled to 8(b)(7)(C protection, neither Congress nor this Court intended 8(e) to furnish additional protection. The problem with all of this finespun rhetoric, among others, is that no authority was cited for the novel distinction because indeed the law is to the contrary.[7]

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[7]As the General Counsel stated:

> "However, where a construction industry employer has no unit employees or less than a representative complement, and a union pickets to obtain an 8 (f) contract, it is our view that since a question concerning representation could not be held, such picketing would be violative of 8 (b) (7) (C) from the first day. Memorandum 79 - 32, p. 9."

The Court of Appeals has failed to apply the principles enunciated by this Court in the Connell decision. The four dissentors succinctly recognized this departure.

C. This Case Presents a Question of National Importance Which Has not Been But Should be Decided.

Assuming, arguendo, that the Connell decision must be confined to its facts and the principles enunciated therein are concluded to be of uncertain application here, then there is an unsettled question of national significance which should be settled here.

Throughout the history of these proceedings, the primary issue, i.e., whether the Connell ruling applies in the context of a collective bargaining relation, has been treated as one of overriding importance in the construction industry.

The NLRB recognized its importance. It was for this reason that it consolidated four cases from across the country; granted an unprecedented six hours of oral argument; granted applications from numerous parties to present amicus briefs and oral argument.

The Court of Appeals also recognized the importance of the issues tendered. First, it allowed a series of amicus briefs to be filed. Second, the Court of Appeals granted rehearing and;

> "Such a hearing or rehearing is not favored and ordinarily will not be ordered except * * * (2) when the proceeding involves a question of exceptional importance." Rule 35(A) FRAP

Third, the Court of Appeals, in its opinion, acknowledged:

> "These cases raise important questions concerning the scope of 8 (e) of the National Labor Relations Act. * * *" p. 1

The perception of both the NLRB and the Court of Appeals as to the significance of the issues presented is accurate. The lawfulness of restraints on subcontracting know no geographic boundaries. If the decision is permitted to stand, it is predictable that this type of clause will immediately become a bargaining demand in each region where a similar clause is not already in place. Refusal on the part of a contractor to agree may create national labor unrest.

An almost certain effect of this decision will be to immunize such provisions from antitrust scrutiny; to present the already overburdened consumer of construc-tion products, the public, with the reality of rapidly escalating and spiraling cost to purchase a home.

The decision will also effect the rights of many nonunion employees. They will be faced with an inexorable top-down

organizing inducement. Work opportunities will be forfeited unless Section 7 rights are sacrificed.

The nonunion contractor will suffer. If it succumbs to pressure which this clause presents, it will necessarily infringe upon employee rights. If it fails to succumb, he may find himself without work.

Even the union contractor suffers. Simple ecnomics dictates that elimination of competition will produce higher cost. Members of the public, and particularly the individual who desires to purchase a home, may have to forego purchase because of cost. Thus the union contractor's work opportunities will themselves become more limited and, as perversity would have it, the union employee's work opportunities will also dwindle.

In the six years since the Connell decision was rendered the scope of the opinion has been debated frequently. In addition to this case, and the companion Shriver-Topaz matter which is presently pending before this Court upon Petition for Certiorari, there are at least five other cases pending before the U.S. District Court for the Ninth Circuit.

Decision is needed by the construc-tion industry on this most important ques-tion. Collective bargaining and day-to-day administration of collective bargaining agreements most urgently require a bright line or litmus test guidance for future conduct.

D. The Decision of the Court of Appeals Conflicts with This Court's Decision.

In National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967) this Court held that 8(e) interdicts only secondary as opposed to primary boycotts, whether effectuated by agreement or through

economic action. The dissent vigorously urged that primary as well as secondary subcontracting restraints were unlawful.[9]

The Ninth Circuit appears to reject the primary/secondary dichotomy set forth by this Court. Its enumeration of a mixed motive test is alien to the teachings of National Woodwork and the consistent line of the NLRB decision.[10]

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[9]Petitioner has previously urged that National Woodwork Manufacturers Association v. NLRB was improperly decided. It contends that all primary restraints are unlawful except in the construction industry where the restraint must be secondary to be unlawful.

[10]See NLRB v. National Maritime Union, 486 F.2d. 907 (2nd. Cir. 1973) cert. den. 416 U.S. 970 (1974).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS

By: _____
THOMAS M. TRIPLETT
of Attorneys for
Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC NORTHWEST CHAPTER OF THE ASOCIATED BUILDERS & CONTRACTORS, INC., Petitioner, -vs- NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 78-3469
OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Petitioner, -vs- NATIONAL LABOR RELATIONS BOARD, Respondent	No. 78-3487
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 701 Petitioner, -vs-	No. 78-3619

NATIONAL LABOR RELATIONS BOARD,

Respondent

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

-vs-

No. 78-3468

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CARPENTERS LOCAL NO. 944 AND CARPENTERS LOCAL NO. 235,

Intervenors.

NATIONAL LABOR RELATIONS BOARD,

-v-

No. 79-7011

CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,

Respondent.

O P I N I O N

Petitions for Review of Orders of
the National Labor Relations Board.
Argued and submitted October 16, 1980.

BEFORE: BROWNING, Chief Judge, CHOY, WALLACE, SNEED ANDERSON, SCHROEDER, FLETCHER, FARRIS, NELSON, CANBY and NORRIS, Circuit Judges

CANBY, Circuit Judge

These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations ACt, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry proviso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the

construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.

Facts.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200 employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargain-

ing agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

> Article VIII
> Subcontractors and Other Employers.
>
> Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Subsequent clauses[1] provide for a grievance procedure leading to arbitration and further provide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings. . . ." The effect of the latter provision is to permit either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e)[2] of the National Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other

work. . . ." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), a group which included Locals Number 235 and 944 involved in this litigation. That agreement expired on Jun 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse

over several issues.[3] One such issue was the union's demand for a clause in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locas were charged with violation of § 8(b)(4)(i) and (ii)(A) of the Act[5] for picketing to require an employer "to enter into an agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso,

and that picketing to obtain such a clause therefore did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because their applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate

§ 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of this court.

II.

Issues.

Four issues are presented for determination in these cases:

(1) are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate

§ 8(b)(4) to enforce them by picketing or strikes?

III.

Applicability of § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In National Woodwork Manufacturer Association v. NLRB, 386 U.S. 612 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangments that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The court therefore held that an agreement between a

union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to perserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as primary and therefore did not constitute an unfair labor practice.[7] The test whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." Id. at 645. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisfy union objectives elsewhere." Id. at 644.

By the National Woodwork test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees

of the contracting employer by limiting the amount of subcontracting. Nor do they seek to protect the wage and benefit standards of those same emploiyees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit. Griffith Co. v. NLRB, 545 F.2d 1194 (9th Cir. 1976), cert. denied, 434 U.S. 854 (1977); NLRB v. National Maritime Union, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. NLRB v. National Maritime Union, 486 F.2d at 914. Second, § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that [the clause] falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation for the employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objective, if "an object of a cluase is to aid union members generally rather than members of the unit, the object is secondary and unlawful." National

Maritime Union, 196 N.L.R.B. 1100, 1101 (1972), enforced, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. See NLRB v. National Maritime

Union, supra, at 913-14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, NLRB v. Denver Building & Construction Trades, 341 U.S. 675 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon

their eligibility for inclusion within the construction industry proviso to that section.

IV.

Scope of the Construction Industry Proviso to § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975). Indeed, it is the effect of Connell that provides the primary ground

of controversy in the present litigation. We believe, however, that the Connell decision is best analyzed after a review of the state of the industry and the legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959); I Legislative History of The Labor-Management Reporting and Disclosure Act of 1959 423 (hereinafter Leg. Hist.). These peculiarities of the construction industry

created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisfy these needs, unions and employers hammered out a number of mutual accommodations. One such arrangment was the closed shop, which was prevalent in the inustry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular

employers.[10] A third device was the agreement to restrict subcontracting in various wasy -- to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially cuased no disruption in the pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over that industry.[13] The Taft-Hartley Amendments to the Act, passed in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refrain from dealing in the products of any other

employer or to cease to do business with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. Guy F. Atkinson Co. and J.A.Jones Construction Co., 90 N.L.R.B. 143 (1950), enforcement denied on other grounds, 195 F.2d 141 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. NLRB v. Denver Building &

Construction Trades Council, 341 U.S. 675 (1951). The picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong. Rec. 111, [1954] U.S. Code Cong. & Admin. News 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted . . . under certain circumstances, against

secondary employers engaged in work at a common construction site with the primary employer." S. Doc. 10, 86th Cong., 1st Sess.; 105 Cong. Rec. 1297; I Leg. Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time--that of limiting "hot cargo" agreements.

In June 1958, the Supreme Court had decided Local 1976, United Brotherhood of Carpenters v. NLRB, (Sand Door), 357 U.S. 93. Sand Door stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot

cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, id. at 107, Sand Door was widely interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished the congressional purposes in various ways. The clearest accomodation to the peculiar conditions of the construction industry was found in § 8(f),[16] which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts amounts to an exception to §§ 8(a)(1), (2) and 8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective

bargaining agreement before the union represents a majority of employees in the unit. International Ladies Garment Workers Union v. NLRB, 366 U.S. 731 (1961); see NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 344-45 (1978). Section 8(f) also shortened to 7 days the period of nonunion workers to join the union undre a union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the Sand Door decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction

industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry proviso excepted agreements "relating to the conrracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work....."

It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed

at the construction site. Although the matter is not free from doubt, we blieve that the legislative history favors the latter view.

(C) Legislative Discussion of the Construction Industry Proviso.

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong. Rec. 17899; II Leg. Histo. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce

a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements between a union and an employer by which the employer would boycott others. The Conference Committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. . . . To the extent that such agreements are legal today under section 8(b)(4) . . ., the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39; I Leg. Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor RElations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating

> to the contracting of work to be done at the site of a construction project.
>
> . . .
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e). . . .
>
> . . .
>
> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

105 Cong. Rec. 17900; II Leg. Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary objectives, which meant that the holding of Denver Building Trades, supra, was left in effect. On the other hand, the Conference

Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The Sand Door decision, supra, which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the Sand Door rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow

the substantive scope of the Sand Door rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. Operating Engineers Local Union No.3 v. NLRB, 266 F.2d 905 (D.C. Cir.), cert. denied sub nom. St. Maurice v. NLRB, 361 U.S. 834 (1959).[22] While that case dealt with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement, the Court referred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms conplying with the terms of the prime employer's agreement. Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The survey canvasses various limitations appearing in subcontracting clauses in the construction industry, but makes no mention of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. Id. at 715-16. That there may not have been a consistent pattern of subcontractor agreements of the

type in issue here is not crucial. What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) The Connell Decision.

It was against this industrial and legislative background that the Supreme Court decided Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975). Connell was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees. the picketing was successful and the contractor sought to annul the

ensuing agreement on the grounds that it violated the antitrust laws.[24] One of the defenses raised by the union was that the agreement could not be a violation of the antitrust alws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme Court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attack the subcontracting clauses in the present case argue that Connell's language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So

interpreted, Connell would invalidate the agreements in issue here at least until the presence of union workers at a particular jobsite triggered their application. We concede at the outset that the Connell opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the Connell decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevailing thrust of Connell is to the contrary and favors a braoder view of the exemption. Our conclusion is supported in particular by the Connell opinion's emphasis on the absence of a collective

bargaining relationship, its references to legislative history, and its characterization of the interests served by the proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of Connell from the present cases is that the agreements in Connell arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in Connell:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective

> bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

421 U.S. at 626.[27] The focus of the Connell decision was therefore understandably upon the situation created by subcontracting clauses in the basence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of Connell, however. The parties themselves had framed the issues toward the same end. the union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship. . . ," but not those

involving a "stranger" contractor. Id. at 627.[28] The subject of controversy, then, was the validity of subcontractor agreements outside of the collective bargaining context, and the Connell opinion must to a large degree be read in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold that this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, . . . may be the basis of a federal anti-trust suit. . . .

Id. at 635. the holding of Connell, then, does not in the strict sense control the cases before us.

The Connell opinion did, however, discuss at length the reach of § 8(e) and its construction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language

of Connell and apply it to the situation of the cases at bar where a collective bargaining relationship existed between the unions and the contractors with whom the agreements were sought.[29] A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of Connell, remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the Connell opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between

union and nonunion workers there. These two themes -- the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite -- are interwoven in Connell as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer -- contractor or subcontractor -- is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As congress recognized in passing § 9(f), collective bargaining cannot even await the presence

of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the

union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand, the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. National Woodwork, supra, at 644-45; National Maritime Union, supra. We do not quarrel with this

well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. NLRB v. Denver Buildings & Construction Trades Council, 341 U.S. 675, 689 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside

of the construction industry pursue secondary objectives.

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the Connell situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in Connell disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It

is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that one of these characteristics is that union workers are traditionally hostile to the presence of nonunion workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements may lead to multiple employers hiring a few workers for short periods of tiem,[30] and where working conditions applicable to one set of workers may very well affect others working on the same project.[31]

We believe that the Connell opinion is sensitive both to the interconnection of interests between employees of the

various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in Connell points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628-29. The legislative history discussed above indicates, we believe, that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in Connell dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that Connell was dealing with a case not considered by congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the Connell opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to voerrule" Denver Building Trades, 421 U.S. at 629. Denver Building Trades had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The Connell opinion refers to congressional discussion of special problems in the construction industry related both to the § 8(e) proviso and to the attempt to overrule Denver Building Trades. That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building

project, and the close relationship between contractors and subcontractors at the jobsite." Id. at 629-30. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secretary boycott ban is based upon the concept of two employers - a primary and a secondary employer. Teh theory is that a neutral employer should not be compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. the Board has considered subsidiaries to be separate employers. Other enterprises,

> substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
>
> The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.
>
> He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong. Rec. 17880-81; II Leg. Hist. at 1425. Even where the sources cited by Connell deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the

members in secondary employ. the memorandum by representatives thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its won employer, must not be allowed to obscure their common interests-they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
>
> . . . [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. the undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong. rec. 15541; II Leg. Hist. 1577.

These materials cited by the Connell Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The Connell opinion quotes National Woodwork Manufacturers, supra, to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at

630, quoting 386 U.S. at 638-39. It is clear that the Connell opinion views the jobsite considerations of National Woodwork as going well beyond the problem of friction among workers,[34] because Connell next refers to some courts that have suggested that the proviso serves an "even narrower function" -- the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." Id. at 630, quoting Drivers Local Union No. 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966). The Connell opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the Connell case the union did not purport to represent any of the interests served by the proviso. 421 U.S. at 631.[35]

We believe that it would do some violence to the language of the Connell opinion to adopt the "even narrower" view of the construction industry proviso which the Court in Connell did not represent to be its won. yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-shoulder jobsite friction can occur. Instead, we think that it si more in accord with the language of Connell to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the Connell opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by Connell's recognition of other vital

concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in any subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. the answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may lead attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The Connell opinion's condemnation of the "unlimited" top-down organizing weapon

with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in Connell disclaimed any interest in organizing or representing connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there woudl be no limit at all to the coercive force the union coudl apply. The decision in Connell solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining

relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in Connell, where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the Connell Court stated:

> [W]e think its authorization extends only to agreements in

> the context of collective bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to commonsitus relationships on particular jobsites as well.

421 U.S at 633. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship clearly brings a union signator subcontracting agreemetn within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that Connell does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) Practical Consequences.

Our reading of Connell to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it si supported by the sever practical limitations attending a contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. if unions are confined to negotiating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of

subcontracting agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholsesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted that the appearance of any union worker on the job triggers subcontracting agreements covering the

entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are withinthe proviso of § 8(e). First, there are overwhelming practical difficulties in confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, teh legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining agreements. Third, the Connell decision which admittedly has language that might point to either result, may fairly be read to support the validity of

subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true tht the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.

Additional Issues.

It is contended by AGC that even if the construction industry proviso authorizes clauses requiring

subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union": subcontractor agreement it a decision that was submitted to the House committee considering the 1959 amendments. Operating Engineers Local Union No. 3 v. NLRB, supra; 2 House Hearings 803-07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia

Circuit in Donald Shriver, Inc. supra, slip op. at 52-5. WE also noted that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The actual

working of § 8(b)(4)(ii)(A), however, prohibits coercion of any person "to enter into any agreement which is prohibited by [§ 8(e)]."[42] The negative implication of this provision is surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. Construction Production & Maintenance Laborers Union, Local 383 v. NLRB, (Coulson & Stevens Construction Co.) 323 F.2d 422 (9th Cir. 1963); Orange Belt District Council of Painters No. 48 v. NLRB, 328 F.2d 534, 537 (D.C. Cir. 1964); Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB, 332 F.2d 636 (3d Cir. 1964). The Board

subsequently acquiesced in the court's view. Northeastern Indiana Building & Construction Council, 148 N.L.R.B. 854 (1964), remanded on other grounds, 352 F.2d 696 (D.C. Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreemetn achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuan to the grievance procedure.[43] The Board

concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history maeks clear Congress's intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. NLRB v. International Brotherhood of Electrical Workers, 405 F.2d 159, 163-64 (9th Cir. 1968), cert. denied, 395 U.S. 921 (1969). We have also held that such clauses may be enforced by

arbitration. La Mirada Trucking, Inc., v. Teamsters Local Union 166, 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitration award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agreement to mean what it says. Operating Engineers, Local No. 701 v. NLRB, 578 F.2d 841, 842 (9th Cir. 1978);

Donald Schriver, Inc., v. NLRB, supra, slip op. at 57-58.

VII.

Conclusion.

We find that provisions i a collective bargaining agreement forbidding the signatory employer to subcontract work at a construction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to the section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employers to enter suhc agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently

invalid. We accordingly enforce the orders of the Board in their entirety.

FOOTNOTES

1. Other relevant clauses of the AGC agreement are:

ARTICLE IX

Settlement of Disputes

Grievances Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * *

Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party . . ., then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings . . . and they shall not be considered in violation of any part of this Agreement.

ARTICLE X

Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement. . . .

2. Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work . . . .

3. Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foreman in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

4. The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and

gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

5. Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

(b) It shall be an unfair labor practice for a labor organization or its agents --

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing

> business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

6. Along with the present cases, reported at 239 N.L.R.B. 274 (1978) (Pacific Northwest) and 239 N.L.R.B. 241 (Woelke), the Board decided Los Angeles Building & Construction Trade Council (Donald Schriver, Inc.), 239 N.L.R.B. 264 (1978), and Colorado Building & Construction Trades Council, 239 N.L.R.B. 253 (1978). The Board's order upholding broad subcontractor agreements in Schriver was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. Donald Schriver, Inc. v. NLRB, Nos. 78-2177, 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

7. "Union standards" clauses, which require that an employer not subcontract with anyone whose wage and

benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. Truck Drivers Union Local No. 413 v. NLRB, 334 F.2d 539, 548 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964); NLRB v. National Maritime Union, 486 F.2d 907, 912 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

8. Haber, Industrial Relations in the Building Industry 238-40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. Id. at 240.

9. Dunlop, The Industrial Relations System in Construction, in The Structure of Collective Bargaining 255, 256-57 (Weber ed. 1961).

10. S. Rep. No. 187, supra, 28; I Leg. Hist. 424. See generally, Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

11. A union attempt to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. Levering & Garrigues Co. v. Morrin, 71 F.2d 284 (2d Cir.), cert. denied, 293 U.S. 595 (1934).

12. Marcus, Secondary Boycotts, in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961) (hereinafter referred to as LMRDA Symposium).

13. Brown and Root, Inc., 51 N.L.R.B. 820 (1943); Johns-Manville Corp., 61 N.L.R.B. 1 (1945).

14. The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 supra.

15. Denham, Taft Act's Impact on the Construction Industry, reprinted in 21 L.R.R.M. 44 (1948). The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board

decided United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industry (Brown-Olds), 115 N.L.R.B. 594 (1956), and Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific), 119 N.L.R.B. 883 (1958), remanded on other grounds, 270 F.2d 425 (9th Cir. 1959). Appruzzese, The LMRDA and the Building and Construction Industry, LMRDA Symposium, note 12, supra, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. See Fenton, Union Hiring Halls: NLRB Rules, Penalties, 42 L.R.R.M. 101, 103 (1958).

16. Section 8(f), 29 U.S.C. § 158(f), provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the

making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

17. S. 1555, 1 Leg. Hist. 582.

18. H.R. 8342 as amended by H.R. 8400, I Leg. Hist. 683.

19. H.R. Rep. No. 1147 (Conference Report) 86th Cong., 1st Sess. 38-40; I Leg. Hist. 942-44 (1959).

20. The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states:

Provided further, That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry

> affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer" or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. . . .

21. There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. See, e.g., 105 Cong. Rec. 17381, II Leg. Hist. 1385 (Senators Javits and Goldwater); 105 Cong. Rec. 15538, II Leg. Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong. Rec. 15848; II Leg. Hist. 1680 (Rep. Teller).

22. The Engineers decision was submitted to the House committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 and Related Bills Regarding Labor-Management

Reform Legislation, 803-07 (1959) (hereafter House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in Engineers, appeared before the Committee and testified as to the scope of the contracting clause:

> The contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses (sic) says that any time an AGC contractor subcontracts work the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers Local 3.
>
> Since about 1955, the AGC and the Operating Engineers have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.

5 House Hearings 2366 (Emphasis supplied).

Although the Engineers decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's

attention. Senate Hearings 752 (Testimony of Sen. Curtis).

23. Office of the General Counsel, Memorandum 76-57, December 15, 1976, reprinted in Labor Relations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards clauses, the General Counsel found that study "inconclusive." Id. at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. Id. at 309.

24. Connell was another chapter in the dispute in Dallas between building contractors and trade unions. In Dallas Building & Construction Trades Council v. NLRB, 396 F.2d 677 (D.C. Cir. 1968), a clause similar to the one in Connell was at issue. Unlike Connell, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the

District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days be § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the unions picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General Counsel refused to issue a complaint. See Connell, 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631-32 n. 10.

When Local 100 began picketing Connell, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

25. But for the Connell decision, we would have no difficulty in enforcing the Board's order. Prior to Connell, this court, other circuits and the Board had upheld broad subcontracting clauses in collective

bargaining agreements. See, e.g., Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963); Suburban Title Center Inc. v. Rockford Building & Construction Trades Council, 354 F.2d 1, 2-3 (7th Cir. 1965), cert. denied, 384 U.S. 960 (1966); United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 48, 190 N.L.R.B. 415, 416-17 (1971).

26. See Connell, 421 U.S. at 622-23; St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C., § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. Connell, supra, 622-23. See

generally, R. Gorman, Basic Text on Labor Law. 621-31 (1976).

27. The fact that Connell was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, infra p. ___, but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, of course, is frequently contrary to that of the antitrust laws. See St. Antoine, supra, n. 26.

28. The briefs in Connell concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to Connell. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished

in the Connell opinion as being " . . . addressed to a different argument that a subcontracting clause should be allowed only if there is a pre-existing collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10. (emphasis in original).

29. In Woelke, the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during negotiations to renew the contract. In Pacific Northwest, the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in Donald Shriver Inc. v. NLRB, Nos. 78-2177 and 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

30. The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the average, each firm employed six construction workers. U.S. Bureau of the Census, Census of Construction Industries (1977), cited in Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.

. . .

> [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, The Building Trades and Title VII of LMRDA, in LMRDA Symposium, supra, note 12, at 1034, 1043.

31. See Donald Schriver Inc., supra, slip op. at 43-46.

32. In Connell, the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in Operating Engineers, supra, as well as the House and Senate Hearings, supra, note 24,

suggest that Congress was well aware of the existence of these clauses.

33. Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong. Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231, (Project Engineering Co.), 75 F.Supp. 672 (S.D.N.Y. 1948).

34. Indeed, National Woodwork contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32. That footnote refers to Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB, 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 684-89 (1951), which discusses not only jobsite friction but also the additional considerations of interchangeability of

workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employees at the jobsite.

35. Essentially the same situation was dealt with by this court in ACCO Construction Equipment, Inc. v. NLRB, 511 F.2d 848 (9th Cir. 1975). ACCO does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read that as essential to its decision. ACCO was written before Connell and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interests" which are emphasized in National Woodwork, Connell, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

36. Because the proviso is an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

37. Our reading of the quoted language in Connell as presenting disjunctive alternatives rather than conjunctive and cumulative requirement is supported by the District of Columbia Circuit and probably by the Third Circuit. Donald Schriver, Inc., supra; Larry v. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council, 609 F.2d 1368, 1374-75 (3rd Cir. 1979) (en banc). Lower courts and commentators have varied in their approach to the underlying issue. See Landscape Specialties, Inc. v. Laborers' International

Union, Local 806, 477 F. Supp. 17 (C.D. Cal. 1979); Long v. Floorcraft Carpet Co., 82 Labor cases ¶ 10,044 (D. OR. 1977); St. Antoine, supra, 62 Va. L. Rev. at 619; Janofsky & Hay, Connell -- Consistent with Past, Indicative of Future, Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursuing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

38. The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We believe that it is a more manageable task, however, to police jobsites to ensure that subcontractors working there have agreements with the policing union than it is to determine

whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

39. NLRB v. Yeshiva University, 444 U.S. 6727 691 (1980). Compare Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-01 (1978), and NLRB v. International Association of Bridge, Structural & Oramental Iron Workers, 434 U.S. 335, 350-51 (1978), with NLRB v. International Longshoremen's Association, 100 S. Ct. 2305 (1980).

40. See International Union of Operating Engineers Locals 542, 542-A and 542-B, (York County Bridge, Inc.) 216 N.L.R.B. 408, 409 (1975), enforced, 532 F.2d 902 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); General Counsel Memorandum, note 25, supra.

41. Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong. Rec. 18128; II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong. Rec. 17900, II Leg. Hist. 1433.

Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, see 105 Cong. Rec. 15516, II Leg. Hist. 1552 (statement of Rep. Madden), said that the question was left open for the courts to decide. 105 Cong. Rec. 19772, II Leg. Hist. 1858.

42. (Emphasis supplied). Section 8(b)(4)(ii)(A) appears supra note 4.

43. See note 1, supra.

44. The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the Sand Door

case Local 1796, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958)." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. See also, 105 Cong. Rec. 17900, II Leg. Hist. 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it. . . ." 105 Cong. Rec. A8359, II Leg. Hist. 1830.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. - Nos. 78-3469, 78-3487, 78-3619, 78-3468, 79-7011

SNEED, Circuit Judge, (with whom CHOY, ANDERSON and FARRIS, Circuit Judges, concur) dissenting:

As with many legal issues, where one ends up in this case depends upon were one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry proviso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches it conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting

point, on the other hand, is with Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), and its concern with the "top-down organizing" effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. Id. at 1348-50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme court

in Connell. ____ F.2d ____ (p. 26 majority opinion). Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, is said not to have been a concern of the Supreme Court in Connell because in that case "the union did not purport to represent any of the interest served by the proviso." ____ F.2d ____ (p. 26). Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in Connell is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more empathetic with Connell's concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union

standards governing wages and working conditions, was more efficient than its competitiors.

It must be acknowleged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 644-46 (1967); see also Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Johnson, 368 F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory

clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of Connell than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrimination by employers." ____ F.2d ____ (p. 29). I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legislative history of the proviso. ACCO Construction Equipment, Inc. v. NLRB, 511 F.2d 848, 851 (9th Cir. 1975). In

surveying the legislative history, we concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. Id. at 851; accord, Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966); Essex County District Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." International Union of Operating Engineers, Locals 542, 542-A and 542-B, 216 N.L.R.B. 408, 409 (1975), enforced, 532 F.2d 902 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977). I see no reason to depart from our earlier analysis of the purpose of the proviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso

was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong. Rec. 19785-86, 19809 (1959); II Leg. Hist. 1815-16 (extension of remarks of Senator McNamara and Representative Thompson); contra 105 Cong. Rec. 20004-05 (1959); II Leg. Hist. 1861 (extension remarks of Representative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As Connell and ACCO concluded, the legislavtive history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction. See e.g., I Leg. Hist. 82 (message from President Eisenhower to Congress); 105 Cong. Rec. 15852, II Leg. Hist. 1684 (statement of Congressman Goodell); 105 Cong. Rec. 17333-34, II Leg. Hist. 1383-84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, it too strongly supports the

conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong. Rec. 15541 (1959); II Leg. Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those challenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect broad subcontractor clauses. I believe this reasoning gives far too much weight to the bare reference to the pattern of collective bargaining referred to in the Committee Report. See Connell, supra, 421 U.S. at 628-29. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That

limitation at least partially overruled the Sand Door case, Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if

subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). Connell, supra, 421 U.S. at 632-33. The holding of the panel gets my nod.[1/]

FOOTNOTE

1. Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help clause in the AGC contract is invalid.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. - Nos. 78-3469, 78-3619, 78-3468, 79-7011.

FARRIS, Circuit Judge, with whom Judge Choy and Judge Anderson join, dissenting:

I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to nonsignatory contractors. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . ." Id. The precise issue here is whether that proviso legalizes agreements that limit subcontracting at sites where the employer has no employees represented

by the union. The majority holds that it does. I disagree.

In Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." Id. at 633.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a collective bargaining agreement to restrict an employer's subcontracting at the

jobsite where it employs the union's members. The majority asserts that another purpose--maintenance of contract standards in the industry--requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. See also Donald Shriver, Inc. v. NLRB, No. 78-2177, slip op. at 43-47 & n.29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in Connell read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists any restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are related. It is not sufficient that the restraint serves the interest of workers in the industry

generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, primary restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. See generally Archibald Cox, Derek Bok & Robert Gorman, Cases and Materials on Labor Law 892-95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit

restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD,

Respondent

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

v. No. 78-3468

NATIONAL LABOR RELATIONS BOARD,

Respondent

and

CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICAN, AFL-CIO,

Intervenors.

NATIONAL LABOR RELATIONS BOARD,

v. No. 79-7011

CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF

OPINION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC NORTHWEST CHAPTER OF THE ASOCIATED BUILDERS & CONTRACTORS, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 78-3469
OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent	No. 78-3487
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 701 Petitioner, v.	No. 78-3619

CARPENTERS AND JOINERS OF AMERICAN, AFL-CIO,

Respondents.

On Petition for Review of the Order of the National Labor Relations Board

Before: SNEED and KENNEDY, Circuit Judges, and EAST*, District Judge

SNEED, Circuit Judge:

Construction contractors challenge in these cases the legality of a provision in a collective bargaining agreement which prohibits a signatory contractor from assigning work to subcontractors unless the subcontractors have a collective bargaining agreement with the signatory union. The National Labor Relations Board has ruled that such a provision does not violate the prohibition in the National Labor Relations Act (the Act) against "hot cargo" agreements.[1/]

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

In deciding these cases we must determine the scope of the Supreme Court's holding in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). We hold that under Connell the clauses before use are not lawful under section 8(e) of the Act, 29 U.S.C. § 158(e), and are not within the construction industry proviso of section 8(e).

Our jurisdiction rests on 29 U.S.C. § 160(e) and (f)(1976).

I.

FACTUAL BACKGROUND

Two decisions of the Board are before us for review. The first considered the legality of a collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), which is an association of approximately 200 employers engaged in construction in Oregon an southwest Washington, and the

International Union of Operating Engineers, Local 701 (Engineers). The agreement, effective from June 1, 1975 through May 31, 1980, contains a provision precluding AGC employers from assigning jobsite work covered by the agreement to any subcontractor which does not have a current labor agreement with Engineers.[2/] Another provision makes violations of the agreement subject to a grievance and arbitration procedure, and the results of arbitration are enforceable by "such action as they [the parties] deem necessary. . ." This article would thus permit enforcement of the agreement, including the subcontractor clause, through strikes or picketing.

Following a charge filed by another association of construction employers, the General Counsel of the NLRB issued a complaint alleging that the agreement's subcontractor clause and enforcement

provision violate section 8(e) of the Act.[3/] The case was heard by the Board upon stipulated facts and it held that, while the subcontractor clause fell within the general proscription of section 8(e), the clause was protected by the section's construction industry provision. However, the Board invalidated the self-help enforcement provision insofar as it authorized economic sanctions in support of the subcontractor clause. All parties petitioned this court for review and modification of the Board's order. The Board, of course, seeks enforcement of its order.

The second decision of the Board which we review considered challenges to a proposed collective bargaining agreement which locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), sought to establish with Woelke & Romero Framing, Inc. (Woelke), a

framing subcontractor who has performed work for various construction contractors in souther California. Between 1974 and 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, and, beginning on June 3, 1977, Woelke commenced negotiations with Carpenters concerning a successor arrangement. Two provisions of the proposed new agreement generated contention. One of these provisions forbade Woelke to subcontract jobsite work except with firms having a current labor agreement with Carpenters.[4/] The second provision included foremen within the unit of employees whom Carpenters would represent. According to the parties' stipulations, foremen function as

supervisors and also as Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances. Impasse over these provisions led to the termination of negotiations on August 4, 1977. Thereafter, Carpenters picketed Woelke at four jobsites. As a consequence of this picketing, employees of the subcontractors of general contractors at two of the jobsites refused to work.

Upon charges filed by Woelke, the General Counsel of the NLRB issued a complaint against Carpenters. After hearing the case upon stipulated facts, the Board decided that the proposed subcontractor clause was protected by the construction industry proviso. It follows, the Board held, that picketing by Carpenters did not violate the prohibition in section 8(b)(4)(i) and (ii)(A) of the Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(A).[5/]

Before reaching this conclusion the Board held that but for the construction industry proviso the proposed subcontractor clauses would violate section 8(e).

In addition, the Board concluded that bargaining to impasse and picketing intended to compel the unionization of Woelke foremen constituted a violation of section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B).[6/] and ordered Carpenters to desist from this practice.

The Board requests enforcement of this order. Woelke seeks reversal of the Board's decision with respect to the subcontractor clause.

We shall discuss first the critical issue of these cases, viz. the scope of the construction industry proviso as applied to the subcontractor cluases involved in each case. Thereafter the remaining issues pertinent to each case will be addressed.

II.

SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO

Our analysis will proceed as did that of the Board. That is, we shall initially determine whether these clauses fall within the general proscription of section 8(e) and, inasmuch as we agree with the Board's conclusions that section 8(e) does proscribe these clauses, we shall then determine whether the clauses are, nonetheless, protected by the construction industry proviso. As already indicated our conclusion with respect to the scope of the proviso differs from that of the Board.

A. Does Section 8(e) Proscribe These Clauses?

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. Reading section 8(e)

literally there is no doubt that that section 8(e) proscribes such clauses. The problem is not that simple, however. In National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), the Supreme Court read into section 8(e) a distinction betwen primary and secondary objectives. An agreement which advances only primary objectives of the bargaining employees, such as preserving work opportunities, is not unlawful. Thus, a court must consider:

> . . . whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's]] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] . . . would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer. . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance

> is that employer, or benefits to other than the boycotting employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees.

Id. at 644-45 (citations omitted).

Applying this standard, this court has recognized that a union signatory clause--as opposed to a union or area standards clause, which merely requires that the employees of subcontractors work under the same terms and conditions as those enjoyed by union members--is normally secondary in nature. Griffith Co. v. NLRB, 545 F.2d 1194, 1199 (9th Cir. 1976), cert. denied, 434 U.S. 854 (1977). As the Second Circuit observed in NLRB v. National Maritime Union, 486 F.2d 907, 913 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974): "[i]f the clause is a union signatory clause, the union has an

interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interest of its other bargaining units."

Nor can these clauses be regarded as valid work preservation provisions. They do not assure work opportunities for employees in the respective work units, i.e., employees of AGC or of Woelke; rather, they operate for the general benefit of the respective unions. Hence, neither provision is directed to "the labor relations of the contracting employer vis-a-vis his own employees." National Woodwork Manufacturers, 386 U.S. at 645. We agree with the Board, therefore, that the subcontractor clauses fall within the general prohibition of section 8(e).

B. Does the Construction Industry Proviso Authorize These Clauses?

1. The Interpretation Required by Connell Construction Co.

In determining whether these subcontractor clauses are protected by the construction industry proviso, we encounter the Supreme Court's decision in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). There the union, as a result of picketing, had obtained a subccontractor agreement with a general building contractor even though the union did not represent or seek to represent the contractor's own employees. When the contractor challenged the agreement under the Sherman Act, the union defended, in part, by arguing that the agreement was expressly authorized by the construction industry proviso. Declaring that "section 8(e) must be interpreted in light of the statutory setting and the

circumstances surrounding its enactment," id. at 628, the Supreme Court observed that the section was part of a program enacted to limit "top-down" organizing campaigns. The construction industry proviso, though an exeption to the section's general proscription, should be construed so as not to undermine that objective. Id. at 628-33. The Court concluded that the subcontractor clause in that case was not covered by the proviso. It expressed its holding in the manner:

> "We therefore hold that this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work work only of firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

Id. at 635.

The Board in the cases here being reviewed emphasized heavily the Supreme Court's reliance on the absence of a collective bargaining relationship. Where this relationship exists it held union signatory clauses were within the construction industry proviso. The Board stated:

> "The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective bargaining relationship, and possibly wihtout such a relationship if the clauses are aimed at avoiding the Denver Building Trades [NLRB v. Denver Building Trades, 341 U.S. 675 (1951)] problems."[7]

We disagree. We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite

at which the employer wishes to engage a nonunion subcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite at which the employer wishes to engage a nonunion subcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite his employees who are members of the signatory union, and does not engage subcontractors whose employees are members of the signatory union, can engage nonunion subcontractors to perform work on that particular jobsite that otherwise would be done by members of the signatory union. To do so would not, in our opinion, violate a valid union signatory clause. To hold otherwise extends the construction industry proviso beyond the limits we attribute to Connell.

Out holding recognizes the validity of a provision in a collective bargaining

agreement that with respect to any particular jobsite will preclude the possibility of members of the signatory union being required to share work with nonunion workers. Under a provision of this sort the employment of one member of the signatory union on the jobsite assures that all relevant work on that jobsite will be done by signatory union members. We believe this is a more accurate reading of Connell's holding than that of the Board.

We acknowledge that the teaching of Connell, as applied to the issue we are considering, it not unambiguous. The Court stated that the construction industry proviso applies only to work performed at the jobsite and then added, quoting Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966), that some courts had assigned the proviso the "even narrower function" of alleviating "'the frictions that may arise when union men

work continuously alongside nonunion men on the same construction site.'" Connell, 421 U.S. at 630. The Court's statement left open this "even narrower" view of the proviso's scope. However, since the subcontractor agreement in Connell occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What Connell left unanswered we must confront and answer.

2. Reasons In Support of Our Holding.

We believe our response is supported by the proviso's background and statutory setting. Section 8(e) was enacted as part of the Labor-Management Reporting and Disclsoure Act of 1959. The section was designed, as the Supreme Court noted in

Connell, to strengthen the prohibition in section 8(b)(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. Id. at 628. However, the prohibition in section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and the more limited exception for the construction industry.

The unions and the Board contend that, at least with respect to agreements made within the context of collective bargaining, the proviso should be given the expansive scope which its literal terms suggest. Their argument can be stated syllogistically: At the time the proviso was enacted, the union signatory subcontractor provisions were lawful. The proviso was intended to preserve in the

construction industry the law as it then existed. Hence, the proviso was intended, and should be construed, to protect subcontractor provisions.

The difficulty with this argument is that neither of the premises can be accepted without qualification. In 1959, when section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined. Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958), the so-called Sand Door case which in the unions' view defined the state of the law at that time, involved an agreement forbidding the use of nonunion material, not a subcontractor provision. Moreover, the issue in Sand Door was whether union picketing and coercion designed to enforce a hot cargo provision was unlawful under section 8(b(4), id. at 108, expressly declined to consider

"the invalidity of hot cargo provisions as such." Id. at 107. Thus, the lawfulness of union signatotry clauses such as those challenged here was not determined in Sand Door.

Furthermore, even if subcontractor clauses were lawful proir to the passage of the Labor-Management Reporting and Disclosure Act, it is unclear to what extent the construction industry proviso was intended to preserve the then current law. The unions rely upon statements made by Senator Kennedy and an extract from the Conference Report which suggest that the proviso would not change the law of the Sand Door decision. Yet in explicitly limiting the proviso's protection to jobsite work, Congress adopted a restriction which was never mentioned in Sand Door. Indeed, in the same paragraph which indicates that the law of Sand Door would be preserved, the Conference Report

states that the proviso would not protect "agreements relating to supplies or products or materials. . . delivered on the site of the construction," which was precisely the kind of agreementa t issue, and allegedly declared to be lawful, in Sand Door, H. R. Rep. No. 1147, 86th Cong., 1st Sess. 39, reprinted in I Legislative History of the labor-Management Reporting and Disclosure Act of 1959 at 943 (1959). Hence, the broad assertion that the construction industry proviso was designed to leave the law unchanged is inacurate. Congress may have intended to preserve existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is.

We must, therefore, look to the purpose Congress sought to serve by enacting an exception for the construction industry. In ACCO Construction Equipment,

Inc. v. NLRB, 511 F.2d 848, 851 (9th Cir. 1975), this court surveyed the legislative history of section 8(e) and concluded:

> "Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, "the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." Drivers, Salesmen, Etc., Local 695 v. NLBR, 124 U.S.App.D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the union laborers are in frequent and relatively close contact with the union craftsmen.

The court's conclusion in ACCO is consistent with the Supreme Court's

reasoning in Connell. Connell noted that the construction industry proviso resulted from efforts to overrule the holding of NLRB v. Denver Building Trades Council, 341 U.S. 675 (1951), in which the Supreme Court had ruled that union picketing which was intended to force a general construction contractor to terminate its contract with a nonunion subcontractor violated section 8(b)(4). Connell, 421 U.S. at 629. The Denver Building Trades decision was objectionable because, as Justice Douglas had argued in dissent, "[a]ll the union asked was that union men not be compelled to work alongside nonunion men on the same job." Denver Building Trades, 341 U.S. at 692 (emphasis added). Thus, the purpose of the proviso was to permit unions and construction employers to avoid the tension and discontent that exists when members of a union are required to work on the same jobsite with

nonunion workers of the same craft or trade.[8/] Our holding permits the avoidance of precisely that source of tension and discontent.

We cannot extend the proviso's protection beyond the purpose for which the exemption was created without creating a shield of immunity for agreements which we believe Congress wished to prohibit. Hence, the purpose of th exception dictates its scope. A subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of

jobsite friction between union and nonunion employuees of a particular craft or trade does not arise. Indeed, a general contractor that assigns no employees who are members of the signatory union to a particular construction project occupies the same position, with respect to that project and the signatory union personnel elsewhere is, for purposes of the proviso, irrelevant.

We find additional support for our interpretation of the construction industry exception in the proviso's statutory setting. Section 7 of the Act, 29 U.S.C. § 157, provides, with limited exceptions, that employees have the right to refrain from any or all union activities. In addition, if employees choose to unionize, they have the right to bargain "through representatives of their own choosing. . ." Although section 8(f) of the Act, 29 U.S.C. § 158(f), permits

"pre-hire" labor agreements in the construction industry, that section does not override the workers' rights of self-determination. Connell, 421 U.S. at 632. A union signatory subcontractor clause operates to force nonunion firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. The agreement between AGC and Engineers, for instance, forcloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such a provision is manifest. The clause is thus precisely the kind of instrument for "top-down" organizaing which the Supreme Court condemned in Connell. Id. at 631, 632. For those reasons, we believe that the position taken by the Board, which legitimates the

use of such an organizing weapon by a union as long as the union has a collective bargaining relationship with a signatory employer, is improper.

III.

REMAINING ISSUES

Having decided the principal issue reaised by these cases, we now consider the proper disposition of each of the cases before us.

For reasons elaborated in the preceding section, the subcontractor clause contained in the collective bargaining agreement between AGC and Engineers constitutes a violation of section 8(e). The clause in its present form, as section 8(e) provides, is unenforceable. Hence, we need not decide whether the agreement's self-held enforcement provision as applied to a lawful subcontractor clause would violate section 8(e).

The subcontractor provision proposed by Carpenters in negotiations with Woelke is also unlawful under section 8(e). Picketing engaged in by Carpenters in order to compel Woelke to accept the provisoin was thus a violation of section 8(b)(4)(i) and (ii)(A), and should have been enjoined by the Board. The Board's order is accordingly modified to enjoin Carpenters fro picketing or using economic coercion for the purpose of inducing Woelke to enter into any agreement which contains such a provision. Our disposition of this issue makes it unnecessary to consider Woelke's additional contention that picketing intended to compel acceptance even of a lawful subcontractor clause is prohibited by section 8(b)(4)(i) and (ii)(A).

The Board requests enforcement of its order enjoining the use by Carpenters of picketing, strikes, or other coercion in

order to compel Woelke to include within the bargaining unit foremen who are supervisors or Woelke's representatives for purposes of collective bargaining or the adjustment of grievances. Carpenters has not contested the Board's ruling that picketing or coercion used for this purpose constitutes a violation of section 8(b)(1)(B) of the Act. The Board's order with respect to this issue should be enforced.

The Board shall modify its orders in these cases to conform to the views expressed in this opinion, and those orders, as modified, are ordered enforced.

Enforced as Modified.

FOOTNOTES

1. A hot cargo provision, so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials--or, as in this case, the services--of nonunion employers.

2. The subcontractor clause provides in pertinent part as follows:

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

3. Section 8(e) provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . .

29 U.S.C. § 158(e) (1976).

4. The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The proposed agreement also contains an alternative subcontractor clause, applicable in the event that the principal clause should be invalidated, which would prevent subcontracting with any firm unless the firm's employees belong to a union and unless the subcontractor agrees to comply with the full terms of the labor agreement between Woelke and Carpenters. We accept the Board's conclusion that the alternative provision is merely a disguised union signatory clause, since in practice only a subcontractor affiliated with Carpenters could satisfy its requirements, some of which are unrelated to any legitimate primary interest of the bargaining employees.

5. Section 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents--
>
> * * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on

> any good, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or retrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .

29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).

6. Section 8(b)(1)(B) provides:

> It shall be an unfair labor practice for a labor organization or its agents--
>
> (1) to restrain or coerce . . .(B) an employer in the selection of his representatives for the purposes of collective bargaining or adjustment of grivances; . . .

29 U.S.C. § 158(b)(1)(B) (1976).

7. The unions and the Board purport to find support for this interpretation of Connell in California Dump Truck Owners Ass'n v. Associated General Contractors of America, 562 F.2d 607 (9th Cir. 1977). Declining to find challenged provisions of a labor agreement unlawful under the antitrust statutes, this court in Dump Truck distinguished Connell with the observation that in Connell no collective bargaining relationship had existed. Id. at 613. However, Dump Truck did not involve interpretation of section 8(e), and its quotation from Connell was taken from a section of the Connell opinion which was not concerned with section 8(e). Moreover, the provision challenged in Dump Truck was not a union signatory clause; the provision did not prohibit employuers from using nonunion subcontractors but merely required that such subcontractors receive a rate of pay not less than that of union employees, and

that the union be notified when a nonunion subcontractor was employed. Id.

We are not aware, moreover, of any decision of any other court of appeals which has read Connell as consruing the construction industry proviso so as to protect all subcontractor agreements made in a collective bargaining context. The district courts which have consdiered the question have reached contrary conclusions. Compare, e.g., Long v. Floorcraft Carpet Co., 82 Labor Cases ¶ 10,044, p. 16,151 (D.C. Ore. 1977), with In re Bullard Contracting Corp., 464 F. Supp. 312 (W.D.N.Y. 1979).

8. The employer petitioners argue further that the proviso was not intended to protect particular union caluses, i.e., agreements which require that an employer's subcontractors belong not merely to a union, but to the union which is party to the labor agreement containing the subcontractor proviso. This interpretation is based upon several statements by Senators indicating that the proviso would protect agreements precluding the use of "nonunion" (or, in a single instance, "unorganized") subcontractors. The employer petitioners interpret the term "nonunion" to refer only to firms not belonging to any union, and then make the negative inference that the proviso does not protect subcontractor clauses forbidding the use of firms which, though not associated with the signatory union, are not "nonunion" firms in this narrow sense. This inference is dubious at best and, in any event, the fragments of legislative history upon which these parties rely do not constitute conclusive evidence of the understanding of Congress as a whole. Moreover, this view of the jobsite friction might arise between members of competing unions as well as between union and nonunion workers. We therefore decline to take this restrictive view of the proviso's scope.

APPENDIX C

FJPMT

239 NLRB No. 43

D--4444
Portland, OR

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 701, AFL--CIO; OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

and Case 36--CE--16

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

DECISION AND ORDER

Upon charges filed by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein called ABC), on April 26, 1977,[1] and duly

[1]All dates are 1977, unless otherwise indicated.

served on International Union of Operating Engineers, Local No. 701, AFL--CIO (herein called Engineers), and Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein called AGC), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 19, on September 20, issued and served on Respondents an amended complaint and notice of hearing. The complaint alleges that Respondents entered into an agreement containing a subcontracting clause and an intertwining self-help provision whereby AGC and its employer-members have agreed to cease doing business with other persons in violation of Section 8(e) of the National Labor Relations Act, as amended (herein called the Act). On October 3, 1977, Respondents filed, and duly served on ABC and the General Counsel, their answer to

the amended complaint in which they denied the commission of any unfair labor practices.

Thereafter, on December 2, 1977, Respondents, ABC, and counsel for the General Counsel entered into a stipulation of facts and motion to transfer the proceedings to the Board, wherein they agreed that the charges, the amended complaint, the answer to the amended complaint, and the stipulation of facts, including the exhibits attached thereto, shall constitute the entire record herein and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waive hearing before an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and desire to submit these cases for findings of fact, conclusions of law, and Order directly by the Board. The parties,

however, expressly limited the stipulation of facts for the purposes of this proceeding only. In addition, the parties reserved the right to object to the relevancy, materiality, or competency of any of the facts stated in the stipulation.

On January 16, 1978, the Board issued an order approving the stipulation and transferring the proceedings to the Board and set a date for the filing of briefs. Thereafter, Respondents, ABC, and the General Counsel filed briefs in support of their respective positions. In addition, briefs amici curiae were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades

Department, AFL--CIO, and the Chamber of Commerce of the United States of America.[2]

Pursuant to a notice of hearing issued by the Board on February , 1978, oral argument in this case and related proceedings[3] was held before the Board in Washington, D.C., on February 23, 1978.

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[2] The Chamber's brief is primarily addressed to the issues raised in 239 NLRB No. 42, but also speaks to issues raised by this proceeding.

[3] Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.), 239 NLRB No. 41 (1978); Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates), 239 NLRB No. 42 (1978); Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL--CIO (Woelke & Romero Framing, Inc.) 239 NLRB No. 40 (1978).

In addition to arguments presented by the parties involved in the several proceedings, permission to argue orally as amici curiae was granted to the Chamber of Commerce of the United States of America, the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL--CIO, and the Laborers International Union of North America, AFL--CIO.

The Board has considered the entire record herein as stipulated by the parties, the briefs of the parties and the amici curiae, and the oral arguments made to the Board, and hereby makes the following findings and conclusions:

I. The Business of Respondent AGC

Respondent AGC is an association of employers engaged in the construction industry throughout Oregon and part of the State of Washington. The employer-members

of AGC, including H. A. Anderson Company, Inc., have delegated their collective-bargaining authority to the AGC for the purpose of, inter alia, negotiating and entering into collective-bargaining contracts on behalf of its employer-members with the bargaining representatives of their employees, including Engineers. The employer-members of AGC, in the course and conduct of their businesses, annually purchased goods, materials, and supplies valued in excess of $50,000, which were shipped to said employer-members directly from States of the United States other than the States of Oregon and Washington. The parties stipulated, and we find, that AGC is, and has been at all times material herein, an association of employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and we find, that Respondent Engineers is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

1. Is the subcontracting clause, article VIII, section 1, contained in Respondents' current collective-bargaining agreement prescribed by the general provision of Section 8(e) of the Act, and, if so, is the clause protected by the first proviso thereto?

2. If lawful by itself, does the subcontracting clause in Respondent's current collective-bargaining agreement, when read in conjunction with articles IX and X, violate Section 8(e) of the Act?

B. The Stipulated Facts

As stated, AGC has at all material times herein been an organization of employer-contractors which has been delegated authority for the purpose of negotiating and entering into collective-bargaining agreements on behalf of its employer-members with the bargaining representatives of their respective employees, including Engineers.

On or about June 1, 1975, AGC and Engineers entered into a collective-bargaining agreement, effective June 1, 1975, through May 31, 1980, which contained, inter alia, the following relevant provisions:

ARTICLE VIII

Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building,

structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * * *

Section 3. The Employer shall be responsible and liable for payment of all sums of money required by all terms of this Agreement incurred by any subcontractor. The parties agree the Administrative Trust Office shall notify an Employer within thirty (30) calendar days of any and/or all delinquent payments of monetary contributions due the Trust Office by any and/or all subcontractors used by said Employer. The Employers further agree they will notify the Administrative Trust Office of any and/or all subcontractors (company name and address) used by said Employer on any job and/or or project. If the Employer has notified the Trust Office of said subcontractors and the Trust Office should fail to notify the Employer within the specified time limitations, then the Employer shall be relieved of all responsibility for the subcontractor's delinquent payments to the applicable Trust Funds.

ARTICLE IX

Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

ARTICLE X

Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement and/or any addendum relating thereto.

At all times material herein, Engineers has continued, and is continuing, to give effect to article VIII and article IX and has attempted to enforce article VIII by filing grievances against AGC employer-members pursuant to the master agreement.

Engineers, for example, filed a grievance on November 22, 1976, claiming that H. A. Anderson Company, Inc., violated the subcontractor clause by subcontracting work covered by the master agreement to a subcontractor that did not have an existing contract with Engineers covering such work, the subcontracting having occurred on an Anderson construction project in Clackamas, Oregon. During the 12-month period of the project, there were substantial periods of time when no Anderson unit employees represented by Engineers were present on the jobsite.

C. Contentions of the Parties

1. The subcontracting proposals

The General Counsel, Respondent AGC, and ABC all contend that the subcontracting provision in this AGC-Engineers collective-bargaining agreement is prescribed by Section 8(e) of the Act. Specifically, General Counsel, Respondent AGC, and ABC urge that the clauses here are secondary and not privileged by the construction industry proviso to Section 8(e) of the Act because they are at substantial variance with the Supreme Court's discussion of the construction industry proviso in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975). Furthermore, General Counsel, Respondent AGC, and ABC urge that, even if the subcontracting clause herein is privileged by the proviso to Section 8(e), the "self-help" provision in article IX of the

collective-bargaining agreement removes whatever protections this clause might otherwise enjoy under the proviso.

Respondent Engineers contends initially that the subcontracting clause in issue is a lawful "primary" clause aimed at protecting unit work, with "unit" being defined as the unit coextensive with the scope of the multiemployer bargaining association. Beyond this, Respondent Engineers contends that, even if the subcontracting clause herein is secondary in nature, it is nonetheless privileged by the construction industry proviso to Section 8(e). Finally, Respondent Engineers urges that article IX of its current collective-bargaining agreement with AGC is not a "self-help" clause of the type or character which the Board has found illegal under Section 8(e). Instead, Engineers urges that the "enforcement" aspects of article IX are

aimed at the enforcement of the grievance-arbitration machinery in the contract rather than to the use of economic action to force compliance with the subcontracting provision itself.

D. Discussion and Conclusions

1. The subcontracting clause

Turning initially to the subcontracting clause itself, we must determine whether the clause is primary or secondary in nature. If the clause is primary, than Section 8(e)[4] has no

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[4]Sec. 8(e) provides that:
It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing with any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

application whatsoever, and the Union may engage in whatever actions it could otherwise take absent the restraints of Section 8(e). On the other hand, if the clause is secondary, then Section 8(e) and the proviso come into play and limit the procedures which may be utilized to obtain or enforce the operation of the clause.

The subcontracting clause in the instant case provides that employers signatory to the Engineers-AGC agreement shall not subcontract any jurisdictionally relevant work to any subcontractor who does not have an existing labor agreement with the Union ("Union is defined by the parties as Engineers). By its terms the clause herein permits performance of unit work by employees covered under other labor agreements with Engineers and not shown to be within the bargaining unit covered by the agreement between Respondents. Accordingly, the primary or

secondary character must be evaluated by an examination of whether the conditions of the clause are limited to a requirement that subcontractors observe "the equivalent of union wages, hours and the like."[5]

Clearly, the clause herein does not limit subcontracting to firms which pay the equivalent of the contract wages, hours, etc., contained in the Engineers-AGC agreement, but instead limits subcontracting to "signatory" firms. This type of union "signatory" clause is the type which we have consistently held is not concerned with the preservation of primary unit wor, but one aimed at limiting the firms to

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[5] Local 437, International Brotherhood of Electrical Workers, AFL--CIO (Dimeo Construction Co.), 180 MLRB 420 (1969).

those which AGC members may subcontract.[6] Therefore, we find that article VIII herein is a secondary clause.

Having determined that the clause is secondary, however, we must now consider the contentions of the General Counsel, Respondent AGC, and ABC that the clause is not protected by the construction industry proviso to Section 8(e) because of the Supreme Court's decision in Connell Construction Co., supra.

In Woelke & Romero Framing, Inc., companion case to the instant one and also issued this day, we concluded that the

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[6] Heavy, Highway, Building and Construction Teamsters Committee for Northern California, IBT (California Dump Truck Owners Association), 227 NLRB 269 (1976) (then-Member Fanning and Member Jenkins dissenting in part).

Supreme Court's Connell decision construed the construction industry proviso to Section 8(e).

Having determined that the subcontracting clause herein is secondary but nonetheless privileged by the proviso to Section 8(e), we now turn to the General Counsel's Respondent AGC's, and ABC's contentions that the subcontracting clause is not privileged because it allows for the enforcement of the clause by other than judicial means.

Although Congress, by its enactment of the proviso to Section 8(e), made lawful certain secondary clauses in the construction industry, it nevertheless made clear that such agreements could not be enforced by the threats, restraint, or

coercion prohibited by Section 8(b)(4).[7] This reflected the sense of Congress that, although such agreements could be lawful, the existing law with respect to the non-judicial enforcement of secondary clauses should not be altered. Thus, in the conference report accompanying the 1959 amendments, the committee set forth that "[t]he proviso [to Section 8(e)] applies only to Section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4)."[8]

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[7] Sec. 8(b)(4)(ii)(B) provides in pertinent part:

> (b) It shall be an unfair labor practice fo a labor organization or its agents---
>
> > (4) . . . (ii) to threathen, coerce, or restrain any person engaged in commerce or a industry affecting commerce, where in either case an object thereof is:
> >
> > > (B) forcing or requiring any perso to cease . . . doing business with any other person . . . .

[8] I. Leg. Hist. 943 (LMRDA, 1959).

When viewed in the context of the 1959 amendments generally, it thus appears that, in limiting the enforcement of valid "hot cargo" agreements in the construction industry to judicial means only, Congress did not intend that the proviso to Section 8(e) could be utilized or interpreted so as to allow the inclusion in collective-bargaining agreement provisions which would have the foreseeable effect of authorizing 8(b)(4) violations.[9]

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[9] Then Senator Kennedy explained in a discussion of Sec. 8(e) that:

> Agreements by which a contractor in the construction industry promising not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). . . Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4). . . .
>
> It is not intended to change the law with respect to the judical enforcement of these contracts. . . . [II Leg. Hist. 1433 (LMRDA, 1959).]

This Board, in a long line of decisions,[10] has consistently adhered to the views expressed by Congress with respect to the prohibition on economic action to enforce secondary agreements under the construction industry proviso. The Board (with court approval) has thus held that clauses which purport to authorize a union to employ economic action to enforce secondary subcontracting provisions will serve to remove whatever protections the

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[10] Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (APL--CIO), (Greater Muskagon General Contractors Assn.), 152 NLRB 360 (1965); Ets-Hokin Corporation, 154 NLRB 839 (1965); Local 437, International Brotherhood of Electrical Workers, AFL--CIO (Dimeo Construction Co.), 180 NLRB 420 (1969); General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J. K. Barker Trucking Co.), 181 NLRB 515 (1970); Fresno, Madera, Kings and Tulare Counties Building and Construction Trades Council (Gage Brothers Construction), 218 NLRB 39 (1975); International Union of Operating Engineers, Local No. 12 (Robert E. Fulton), 220 NLRB 530 (1975).

secondary clause would otherwise enjoy under the proviso to Section 8(e).[11]

The main focus of our analysis of self-help clauses and their legality has been to determine the relationship between the clause purporting to authorize economic action and any secondary clauses limiting the subcontracting of work. In other words, subcontracting clauses and clauses authorizing the union to engage in economic action independent of one another, i.e., when a union's right to engage in economic action specifically excludes a subcontracting clause from its application, do not violate Section 8(e). It is only when the Board determines that the parties intended that the economic enforcement provisions apply to the subcontracting clauses that

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[11] See Muskegon Bricklayers Union #5, supra, enfd. 378 F.2d 859 (C.A. 6, 1967); Ets-Hokin Corp., enfd, sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL--CIO and its Local Union No. 769, 405 F.2d 159 (C.A. 9, 1968).

violations of Section 8(e) will be found.[12] The Board has found that "self-help clauses remove otherwise proviso-protected agreements from the scope of that proviso even though the self-help and subcontracting provisions are found in different articles of the agreement,[13] even if the remedy the union seeks would be the same if achieved by lawful judicial means,[14] and although the means of enforcement reserved by the union were not strictly limited to strikes or picketing.[15]

In the instant case, while the limitations on subcontracting are technically linked to the contract's grievance-arbitration machinery, article IX nonetheless

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[12] General Teamsters, Chauffeurs, Warehouseman and Helpers, Local 982, supra.

[13] International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), supra.

[14] Muskegon Bricklayers Union #5, supra.

[15] Fresno, Madera, Kings and Tulare Counties Trades Council, supra.

reserves to the Union the right to take "whatever action it deems necessary" for enforcement at any step of the grievance procedure or for a violation of the applicable time limits for fringe benefit contributions. Furthermore, while article X, section 1, generally provides for no strikes, it is limited by the language "unless otherwise provided herein." Article IX, in turn, allows for whatever action deemed necessary for enforcement with the understanding that such action shall "not be considered in violation of any part of this agreement." (Emphasis supplied.)

Taken together, articles IX and X compel the conclusion that strikes or other economic action which would otherwise be prohibited under article X are allowed under article IX as an "action deemed necessary" by the parties to enforce the grievance-arbitration

procedure. Further, it is clear that a dispute arising under the article VIII restrictions on subcontracting would be submitted to the grievance-arbitration procedures for settlement. If one party subsequently failed to comply with the settlement, the other party, under article IX, is accorded the right to take "any action deemed necessary" to enforce the settlement.

As noted above, Respondent Engineers contends that any economic action that the Union may choose to employ is not strictly to enforce the subcontracting provision in article VIII, but is instead action taken to enforce the findings and/or time limits grounded in the grievance-arbitration provision. Engineers in effect argues that a violation of Section 8(e) is avoided here because the Union has not reserved the use of economic force with respect to the subcontracting clause per se,

but reserved the right to take self-help as it relates to the grievance-arbitration provision.

The grievance-arbitration procedure, however, is simply an agreed-upon method for the resolution of disputes arising under specific provisions of the contract between the parties. As such, it is necessarily connected to the contract provisions which are the source of the disputes submitted for resolution. We therefore hold that the immediate object of a self-help clause (here, the grievance procedure) will not serve to obscure the underlying dispute which gives rise to a claim of liability (in this case, the enforcement of a secondary clause). The effect of a holding to the contrary would be to insulate self-help clauses (as applied to secondary provisions) through the device of the grievance procedure. Read together, articles VIII, IX, and X

sanction economic action to insure compliance with the subcontracting provisions of article VIII. This result serves to remove article VIII from the protection it would othrwise enjoy under the proviso to Section 8(e). Recalling that in its enactment of the proviso to Section 8(e) Congress intended that agreements privileged by that proviso be enforced only through lawsuits, it is clear that if the underlying claim giving rise to liability under article IX, section 5, is rooted in a secondary clause the fact that there is an intermediate stage before the Union may resort to economic action does not alter the fact that the contract allows the Union to employ "non-judicial acts of a compelling or restraining nature, applied by way of concerted self help"[16] for the enforcement

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[16] Local Union No. 48, Sheet Metal Workers International Assn. v. Hardy, 332 F.2d 682 (C.A. 5, 1964).

of a secondary provision. Accordingly, we find that article VIII of the 1975-80 AGC-Engineers agreement is violative of Section 8(e) of the Act.[17]

The Remedy

Having found that Respondents have engaged in unfair labor practice, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

Conclusion of Law

1. The Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., is an association of employers

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[17]Member Murphy emphasizes that all five Board Members, including her dissenting colleague, agree that the actual use of economic action to enforce a clause protected by the construction industry proviso under Sec. 8(e) violates the Act.

engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 701, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to self-help provisions applicable to article VIII of their 1975-80 collective-bargaining agreement, Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL-CIO, violated Section 8(e) of the Act.

4. The above unfair labor practice is an unfair labor practice affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended,

the National Labor Relations Board hereby orders that:

A. Respondent Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving efect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

a. Post at its business offices and mail to its employer-members copies of the

attached notice marked "Appendix A."[18] Copies of said notice, on forms provided by the Regional Dirctor for Region 19, after being duly signed by an authorized representative of Respondent AGC, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained for 60 consecutive days thereafter, in conspicuous posted. Reasonable steps shall be taken by Respondent AGC to insure that said notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order, what steps Respondent AGC has taken to comply herewith.

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[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

B. Respondent International Union of Operating Engineers, Local no. 701, AFL-CIO, Portland, Oregon, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[19] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent Engineers,

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[19]See fn. 18, supra.

shall be posted immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where noticers to members are customarily posted. Reasonable steps shall be taken by Respondent Engineers to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent Engineers has taken to comply herewith.

Dated, Washington, D.C. November 13, 197

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN FANNING, dissenting:

I agree with the finding that the Supreme Court decision in Connell construed the construction industry proviso to permit subcontracting clauses in the context of a collective-bargaining relationship as in this case. However, for reasons stated in my dissenting opinion in Muskegon Bricklayers Union #5, Bricklayers, Mason and Plasters International Union of America (AFL--CIO) (Greater Muskegon General Contractors Association), 152 NLRB 360 (1965), I dissent from the finding that the subcontracting clauses are outside the protection of the proviso because of self-enforcement provisions. Accordingly, I would discmiss the complaint.

Dated. Washington, D.C. November 13, 1978

John H. Fanning, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce that portion of article IX, section 5, permitting "such action as (deemed) necessary," to the extent that such action is authorized to maintain, to give effect to, or enforce the subcontracting clause, article VIII, of the collective-bargaining agreement between Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL--CIO, and to the extent that article IX, section 5, violates Section 8(e) of the National Labor Relations Act.

OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--442--7472.

APPENDIX D

STATUTORY APPENDIX

Text of Labor Management Relations Act of 1947 As Amended (29 U.S.C. 151 et seq.)

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents --

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);

Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void; Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the contstruction, alteration, painting, or repair of a building, structure, or other work; Provided further, That for the purposes of this subsection (e) and Section 8(b) (4)(B) the terms "any employer, "any person engaged in commerce or in industry affecting commerce," and"any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction

industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area; Provided, That nothing in this subsection shall set aside the final proviso to Section 8(a)(3) of this Act; Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 201. That it is the policy of the United States that --

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CLERK

NO. 80-1808

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 8(e) of the Labor Management Relations Act makes it an unfair labor practice for an employer and a union to enter a contract whereby the employer agrees "to cease doing business with any other person." The "construction proviso" to § 8(e) creates an exception for certain agreements between unions and employers in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held that a subcontractor clause which prohibited the general contractor from doing business with any subcontractor that had no labor contract with the union and which thereby organized subcontractors' employees from the top down, was prohibited by § 8(e) and not protected by the construction proviso, when the union did not represent any of the general contractor's employees on any of the general contractor's construction sites.

1. Whether the "collective bargaining relationship" between a union and a general contractor which arises when the general contractor employs a single union member for a time on a single job invokes the protection of the construction proviso for the union's use at all times on all jobs, throughout the life of the labor contract, of a secondary boycott subcontractor clause which compels unionization of workers without their consent and yet fails on most or many jobs to serve the congressional design of avoiding friction between union and nonunion workers.
2. Whether construction unions are free, because of the construction proviso to § 8(e) of the LMRA, to use secondary boycott subcontractor clauses as broad "top-down" organizing weapons in contexts where they have no redeeming virtue of avoiding jobsite friction between union and nonunion workers, simply because the clauses are agreed to in a "collective bargaining relationship" — which in practice means that the clause is applicable at all times to all jobs simply because the general contractor's union employees may either now or in the future work for at least some time on some job.
3. Whether the majority decision below is contrary to *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 US 616 (1975), because *Connell* held a subcontractor clause to be outside the protection of the § 8(e) construction

proviso when the general contractor employed none of the union's members on any of its jobs, yet the majority below held an identical subcontractor clause to be protected by the proviso simply because it was contained in an agreement in a "collective bargaining relationship"—which means in practice that the general contractor may employ a union member on some job some time.

4. Whether *Connell's* prohibition against "allow[ing] unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing" (421 US at 633) can be eluded simply because the general contractor may employ one or more union members on some job some time and thus have a "collective bargaining relationship" with the union.

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Operating Engineers Local Union No. 3 Etc. v. NLRB, 266 F2d 905 (DC Cir 1959) 10

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IN THE

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PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

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OPINIONS BELOW

The opinion of the limited *en banc* panel of the court of appeals (Pet. App. A pp 1-111) has not yet been reported. The opinion of the three-judge panel of the court of appeals (Pet. App. pp 112-146) is reported at 609 F2d 1341 (1979). The decision and order of the National Labor Relations Board (Pet. App. C pp 146-186) is reported at 239 NLRB No. 43.

JURISDICTION

The judgment of the court of appeals was entered and filed on April 17, 1981. The petition for a writ of certiorari was filed on April 29, 1981. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Pet. App. D pp 183-186.

STATEMENT

1. **Facts.** The facts are concise and stipulated. The subcontractor clause in the AGC[1]-Local 701[2] labor contract provides:

> "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm or company who does not have an existing labor agreement with [Local 701] covering such work." (Pet. App. A p 5)

The clause applies at all times to all jobs of all the 200 AGC general contractors throughout the parties' geographical jurisdiction.[3]

2. **Effect of the subcontractor clause.** Since Local 701's labor contracts always require employees performing operating engineer work to join Local 701, the effect of the clause is twofold: (1) It forces all employees of subcontractors doing such work on all the subcontractors' jobs to join Local 701 regardless of their wishes, if the subcontractors are to work on any AGC job; and (2) It forces the AGC general contractors not to deal with any subcontractor that does not require all of his covered employees on all jobs to join Local 701.

By this group boycott, subcontractors whose employees have elected to be nonunion or have selected a different union, are excluded from a large portion of the construction market. Because these restraints apply even to jobs where no union members are present, the restraints do not have the purpose or effect of avoiding jobsite friction between union and nonunion workers.

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[1] "AGC" is the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. It represents about 200 general contractors for whom it negotiates labor contracts with various unions, including Local 701 (Pet. App. A p 4).

[2] "Local 701" is Local 701 of the International Union of Operating Engineers.

[3] The geographical jurisdiction of Local 701 and of the AGC-701 labor contract is the entire state of Oregon and the 5½ counties of Southwest Washington (Pet. App. A p 4).

3. **Proceedings below.** The NLRB held that although this clause is within the general proscription of § 8(e) of the LMRA because it is a secondary boycott, it is nevertheless lawful because protected by the construction proviso to § 8(e).[4] The Court of Appeals for the Ninth Circuit first disagreed with the Board; a unanimous panel held the clause to be outside the construction proviso because it is not within the proviso's purpose of avoiding jobsite friction (Pet. App. B pp 112-146; reported at 609 F2d 1341). The case was reheard by a partial *en banc* panel of the Court of Appeals (Pet. App. A pp 1-111); seven judges agreed with the Board, holding that the proviso protects any clause agreed to in a "collective bargaining relationship" even though it permits top-down organizing without avoiding jobsite friction; four dissenting judges agreed with the prior panel. Of the 13 judges hearing the case, 7 found the clause within the proviso's protection, 6 found it outside the proviso and illegal.[5]

REASONS FOR GRANTING THE WRIT

1. The issue is of broad and fundamental importance throughout the construction industry, as all agree.

There can be no doubt of the importance of this issue. The Board recognized it, devoting an unprecedented day-long oral argument to it. The Court of Appeals recognized it by not only granting rehearing *en banc* but explicitly stating it to be "important" at the outset of its *en banc* decision (Pet. App. A p 3). Many union and employer groups filed amicus briefs.

Indeed, it is difficult to conceive of a more continuously active and broadly important issue in the construction industry. Whether unions can require general contractors to deal only with subcontrac-

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[4] Section 8(e) and its construction proviso state:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . . "

[5] One of the 11 judges on the partial *en banc* panel was also on the three-judge panel.

tors acceptable to those unions affects hundreds of thousands of transactions daily throughout the industry—directly affecting the job rights of countless employees and the business relations of virtually every employer in the industry.

If the decision below is accepted as the law, then all subcontractors' employees are fair game for top-down organizing. Unions can exclude all nonunion subcontractors from the market by simply requiring such a subcontractor clause in their labor contracts with general contractors. Employees of all subcontractors who work for signatory general contractors must join the union even though there is no possibility of any jobsite friction between them and the union's members.

The sole function of this form of subcontractor clause on jobs where, as commonly occurs, no union-nonunion friction is possible, is to force union representation upon employees without their consent—to organize them from the top down. This broad and egregious top-down organizing impact is not disputed. The sole issue is whether the construction proviso's purpose, and therefore its effect, is to immunize construction unions from the prohibitions against such restraints.

2. The decision below conflicts with *Connell Co.* v. *Plumbers*, 421 US 616 (1975). This subcontractor clause destroys employees' self-determination rights through a group secondary boycott that organizes subcontractors' employees from the "top-down," yet the operation of the clause is not limited to close jobsite relationships where these restraints could be justified as a means of avoiding friction between union and nonunion workers.

a. **The *Connell* decision analyzed the scope of the construction proviso in terms of close jobsite relationships where friction can occur.** In *Connell* this Court held a virtually identical subcontractor clause[6] to be unprotected by the proviso and illegal. Just as here, the subcontractor agreement was between a general contractor (Connell) and a union; and just as here, the agreement prohibited the

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[6] The subcontractor clause in *Connell* stated "that (if) the contractor should subcontract any of the [covered work] ... said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 ... " (421 US at 620).

general contractor from doing business with any subcontractor that had no labor contract with the union. And just as here, the effect of the clause was to force union representation upon subcontractors' employees without their consent—to organize them from the top down.

The Board and the majority of the court below held that such a subcontractor clause becomes lawful and enforceable at *all* times on *all* jobs of the general contractor simply because the union represents at least one of the general contractor's employees at some time on some job—or at least claims to represent such an employee on a present or future job. According to the Board and the majority below, such facts cause the existence of a "collective bargaining relationship" and by this label they would immunize the restraints on employee and employer rights. And this is so even though the effect of the clause is identical in all respects to the illegal *Connell* clause on all jobs where none of the union's members are present.

Connell's analysis when it held such a clause illegal, was as follows: *Connell* stated that a "major aim" of the 1959 Congress, which enacted the proviso, was to prohibit precisely such top-down organizing. The proviso is an exception to this prohibition. *Connell* defined the scope of that exception in terms of the Congressional policies underlying the proviso. The Court noted that Congress' discussion of the construction proviso "focused on ... the close relationship between contractors and subcontractors at the jobsite", citing portions of the Congressional Record which described "single jobsite[s]" "where all the men are employed on the same project ... [where] they work side by side."[7] *Connell* noted this Court's prior statement that the proviso was "'designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there'"[8] and quoted with favor a court of appeals decision that "'[T]he purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside

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[7] 421 US at 629-630, citations in footnote 9; quotations from Representative Thompson and Udall (105 Congr Rec 15541) and memorandum by Sen Elliott (Id. at 15551-15552).

[8] Id at 630, quoting from *Woodwork Manufacturers Asso. v. NLRB*, 386 US at 638-639.

nonunion men on the same construction site.'"[9] *Connell* stated that the proviso "seems ... to have been adopted as a partial substitute for an attempt to overrule this Court's decision in *NLRB v. Denver Building Construction Trades Council*, 341 US 675" (Id at 629), and referred (Id at 630) to the brief dissent of Justice Douglas in *Denver* where he stated:

> " ... All the union asked was that union men not be compelled to work alongside nonunion men on the same job ... " (341 US at 692).

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[9] Ibid, quoting from *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 61 F2d 547, 553 (D.C. Cir 1966). The same statement has been made by other courts and the Board: *Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F2d 848, 851 (9th Cir 1975) (quoting with approval the above language and " ... what is analytically fundamental to the proviso is whether union and nonunion laborers will be required to work together for more than brief periods of time"); *Associated Gen. Contractors of Cal., Inc. v. N.L.R.B.*, 514 F2d 433, 439 (9th Cir 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite."); *Essex County Vic. Dist. Coun. of Carpenters, Etc. v. N.L.R.B.*, 332 F2d 636, 640 (3rd Cir 1964) (the proviso was enacted " ... in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project ... ") (cited with approval on this point in *Woodwork Manufacturers Asso. v. NLRB*, 386 US 612, 639, n. 32 (1967)); *N.L.R.B. v. Intern. Union of Op. Engineers, Etc.*, 532 F2d 902, 907 (3rd Cir 1976) (the "rationale" of the proviso is " ... eliminating friction between union and nonunion workers on a jobsite ... "); *Operating Engineers Local 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742, 752 (1973), enf'd 511 F2d 848 (9th Cir 1975) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ... "); *Operating Engineers v. Neilsen Co.*, 92 LRRM 2861, 2863 (D Id 1975) (the proviso "was designed to alleviate the frictions which arise at a construction site when union men work alongside nonunion men"); *Long v. Floorcraft Carpet Co.*, 95 LRRM 3143, 3144 (D Or 1977) (" ... 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside non-union men on the same construction site,' ... " quoting with approval from *Acco, supra*, at 851 (Emphasis in original)); *Long v. Pam's Carpet Service*, 95 LRRM 3145, 3146 (D Or 1977) (quoting the same language quoted in *Long v. Floorcraft, supra); Waggoner v. R. McGray, Inc.*, 432 F Supp 580, 583 (CD Cal 1977), rev'd on other grounds, 607 F2d 1227 (9th Cir 1980) (quoting from *Acco* the same language quoted in the *Long* cases, *supra*); *Intl. Union of Operating Engineers, Local 542 (York County Bridge, Inc.)*, 216 NLRB 408, 409, 88 LRRM 1405, 1407 (1975), enf'd 532 F2d 902 (3rd Cir 1976) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ... ").

Connell explicitly observed that in the § 8(e) proviso

> " ... Congress did not ... indicate that [construction unions] were free to use subcontracting agreements as a broad organizational weapon ... " (Id at 630).

Connell then applied "these policies" to the subcontracting agreement before it (Id at 631). It found the agreement "not ... related to any of these policies" (Ibid). The agreement "was not designed to protect the union's members" from "having to work alongside nonunion men ... since it was not limited to jobsites on which they were working" (Ibid). *Connell* observed that

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees" (Id at 632, footnotes omitted);

and that Congress enacted "careful safeguards preserving workers' rights to decline union representation" (Ibid). The final paragraph of *Connell's* analysis of this point begins:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing ... (Id at 633).

Since the subcontractor clause before it was not within the proviso's purpose, *Connell* held it not within the proviso and illegal under § 8(e).

The union in *Connell* did not represent any of Connell's employees on any of its jobs. Because of this no "collective bargaining relationship" existed between Connell and the union. However, the decisive factor in *Connell's* analysis was not the absence of a "collective bargaining relationship" but the absence of the union members on the jobsite; what made the absence of a "collective bargaining relationship" meaningful was the absence of the union's members on the jobsite. The close side-by-side relationship did not exist. Without even the possibility of a union member's presence on the site, there was no hazard of the union-nonunion friction which prompted enactment of the proviso and thus no reason to tolerate the violation of workers' rights to decline union representation.

b. **The majority decision below is contrary to Connell.** The majority decision below is fundamentally inconsistent with *Connell* for the reasons that follow:

1. **The majority's reliance on "peculiarities" in the construction industry is contrary to *Connell*, which involved no such analysis, and such "peculiarities" do not justify top-down organizing.** The majority found support for its decision in "peculiarities of the construction industry" (Pet.App.A p 19). These "peculiarities" were described as short job duration causing "difficulties of organizing" and difficulty in "maintaining wage and benefit standards" for unions, and the employers' need for a "ready source of skilled workers" and ability to "forecast labor costs" (Pet. App. A p 20). But in its thorough analysis of the proviso *Connell* had no occasion to examine these characteristics. Nor do any of these characteristics warrant the gross intrusion on employee rights of free choice brought about by this clause. "Wage and benefit standards" can be maintained without forced unionization by simply using a union standards subcontractor clause (see discussion below). Employers' needs for skilled workers and forecasting labor costs can be satisfied by their voluntary use of union sources. Forced top-down organizing is not required to serve these needs.

In another construction industry case, *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335 (1978), this Court analyzed "aspects peculiar to the building trades" perceived by the 1959 Congress (434 US at 348), a list nearly identical to the "peculiarities" discussed by the majority below. In stark contrast to the majority below, however, *Higdon* concluded that Congress' perception of these characteristics did *not* evidence an intent to tolerate top-down organizing; on the contrary, *Higdon* stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry . . . " (434 US at 347-348).[10]

2. **The majority's reliance on legislative remarks is contrary to *Connell*, which dismissed the same remarks as "bare references" and is contrary to the Ninth Circuit's own prior decisions.** The majority ruling below relies on 1959 legislative remarks to the effect that the proviso was intended to preserve the existing-pattern of collective bargaining and was not intended to change existing law.

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[10] Consistent with this view of the legislative history, *Higdon* ruled that a minority construction union which signs a "prehire contract", lawful under § 8(f), is forbidden by § 8(b)(7) to picket to enforce that contract.

But these identical remarks were cited and dismissed in *Connell* as "bare references" (421 US at 628).[11]

Even if the majority below were correct in resting its decision on legislative statements which *Connell* dismissed, those statements cannot, consistent with the holding in *Connell*, support the legality of the clause here. Every legislative statement which the majority construes to support the legality of the clause here is equally supportive of the legality of the clause in *Connell*. The majority's reasoning is thus in direct conflict with *Connell*.

The majority relies on Senator Kennedy's statement that the proviso was "necessary to avoid serious damage to the pattern of collective bargaining [in the construction industry]" (Pet. App. A p 28). Since "some such union signatory agreements existed [in 1959]" (Pet. App. A p 34), the majority states, Kennedy's statement requires that such clauses be legal under the proviso. The majority does not even consider whether "some" clauses of the type disapproved in *Connell* also existed in 1959. In fact, the Board's General Counsel has determined that such clauses were "commonplace" in 1959. In an opinion issued in 1974 the General Counsel stated that "both prior to and subsequent to the 1959 amendments" agreements in the construction industry "containing little more than subcontracting provisions" and "not [in a] conventional collective bargaining relationship" were "commonplace."[12] Thus, since there were at least "some" subcontractor

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[11]The comments in the Congressional Record show by their own language that it was assumed that the employees were working side-by-side on the same jobsite. A thorough review of the Congressional Record shows no assertion that subcontractor clauses were thought to be lawfully applicable where no side-by-side relation existed. On the contrary, it was the very existence of that side-by-side relationship that was said to justify the proviso.

[12] 1974 Labor Relations Yearbook (BNA 1975) 298, 307. The full text of the General Counsel's statement on this question is as follows:

" . . . organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proferred are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions

(footnote continued next page)

clauses *outside* a "collective bargaining relationship" in 1959, just as there were at least "some" subcontractor clauses *in* a "collective bargaining relationship" in 1959, by the majority's logic, the *Connell* clause should have been just as legal as the clause here.

The majority also seeks support in 1959 legislative statements that the proviso was "intended to preserve the present state of the law" (Pet. App. A p 29). It cites *Operating Engineers Local Union No. 3, Etc. v. NLRB*, 266 F2d 905 (DC Cir 1959), cert denied sub nom *St. Maurice v. NLRB*, 361 US 834 (1959), for the proposition that union signatory clauses were legal in 1959 (Pet. App. A p 32). But the majority makes no inquiry whether union signatory clauses not in a "collective bargaining relationship" were also legal in 1959. The very *Operating Engineers* decision on which the majority relies indicates that union signatory clauses were lawful regardless of whether or not a collective bargaining relationship is present. Nothing in the logic or authority underlying the holding in that case suggests that the presence or absence of a collective bargaining relationship has any bearing on the outcome. If, as the majority urges, that case represents "existing law" in 1959, then the existing law was that union signatory clauses are lawful whether or not a collective bargaining relationship exists.

In sum, the majority's reliance on the legislative statements eschewed in *Connell* leads to a result in this case which is in irreconciliable conflict with *Connell*. A decision such as this which is on a subject of this importance and which is at such variance with the law as determined by this Court should not be allowed to stand.

The majority's view of the legislative history of the proviso is also contrary to the Ninth Circuit's own prior decision in *Acco Construction Equipment, Inc. v. NLRB*, 511 F2d 848 (9th Cir 1975).[13] That case held:

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governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council v. N.L.R.B.*, 396 F.2d 677, 68 LRRM 2019 (C.A. D.C.), at p. 682:

"' . . . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 "umbrella" agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . . '"

[13] It is also contrary to the Ninth Circuit's decision in *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 514 F2d 433, 439 (9th Cir 1975), which followed *Acco*.

" . . . Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men *work continuously* alongside nonunion men on the same construction site.' Drivers, Salesmen, Etc., Local 695 v. NLRB, 124 U.S. App. D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added).[7] What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen.[8]

"7. See Essex County & Vic. Dist. Council of Carpenters v. N.L.R.B., 332 F.2d 636, 640 (3rd Cir. 1964) ('This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.'); Note, Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e), 38 N.Y.U.L. Rev. 97, 110-11 (1963): cf. Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Rev. 724, 753 (1960).

"8. . . . What is analytically fundamental to the proviso is whether union and non-union laborers will be required to work together for more than brief periods of time." (511 F2d at 851) (Emphasis in original) [14]

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[14] The majority concedes that "ACCO [sic] does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction" (Pet. App. A p 89). It seeks to distinguish *Acco* on the ground that the workers were "essentially off-site workers" so were "not at all involved in the 'community of interests' which were emphasized in *National Woodwork, Connell,* and this opinion" (Ibid). However, *Acco* does not rest on such an alleged distinction. Rather, it reasons directly from the proviso's purpose of avoiding jobsite friction and finds the subcontractor clause outside the proviso because outside that purpose.

The significance of the *Acco* ruling was properly recognized in the dissent below: "As *Connell* and *Acco* concluded, the legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction" (Pet. App. A p 102). Similarly, the three-judge panel below stated: "Thus, the purpose of the proviso was to permit unions and construction employees to avoid the tension and discontent that exists when members of a union are required to work on the same jobsite with nonunion workers of the same craft or trade" (Pet. App. A pp 136-137).

3. **The majority's reliance on "immense practical problems" is baseless and is contrary to *Connell*, which confined the construction proviso's scope to its purpose.** The argument of the majority below that "immense practical problems" (Pet. App. A p 59) attend the ruling of the three-judge panel is baseless. The majority suggests that subcontracting agreements limited to sites where union employees are present (and where union-nonunion friction can therefore occur) may require separate negotiation for each jobsite (Pet. App. A pp 59-60). But there is nothing in the jobsite-friction rule that would necessitate such repeated negotiations. As the majority itself recognizes (Pet. App. A p 60) a single agreement can be negotiated which applies to every job where union-nonunion friction is a possibility.

The contention that "enforcement problems" of such a clause "remain severe" (Pet. App. A p 60) ignores decades of experience under the NLRB's rule for common-situs secondary boycotts. That rule permits a union to picket a construction jobsite only when employees of the primary employer are on the jobsite.[15] The test of legality based on the jobsite presence of particular employees is thus commonplace in the construction industry and is no more difficult to apply in determining the legality of enforcing a subcontractor clause than in determining the legality of a picket line.

Nor is there anything in *Connell* which remotely suggests that the scope of the construction proviso is to be determined by alleged practical problems in carrying out its purpose.

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[15] *Carpenters Council of Milwaukie*, 196 NLRB 487, 490, No. 60 (1972); *Local 519, Journeymen v. NLRB*, 416 F2d 1120, 1124-1126 (DC Cir 1969).

4. **The majority's decision is rooted in the mistaken belief that such a subcontractor clause is needed to protect union standards; but union standards can be protected by a union standards clause, which does not have the vice of top-down organizing.** The majority's opinion below does reach jobsite considerations, and this is the core of its decision and the nub of its error. It is also the nub of its conflict with *Connell*. Stripped of its lengthy garb, the majority's opinion finds the restraints of the subcontractor clause justified by the union's need for "maintaining wage levels [and] protecting benefits" (Pet. App. A p 42). The majority reasons that because of the close proximity of jobsite employees the "working conditions applicable to one set of workers may very well affect others working on the same project" and, therefore (the majority holds), protecting these interests outweighs the evils of the top-down organizing and employer boycotts (Id at 46).[16]

But the majority overlooks that these interests can be protected just as effectively by a "union standards" clause, which requires all subcontractors to adhere to union standards. It is settled that such clauses are lawful and, because they are primary, are not prohibited by § 8(e) and require no proviso protection.[17] Because union standards clauses do not require the subcontractor to sign a union contract, the rights of free choice of the subcontractor's employees are fully preserved at the same time that the unions' standards are

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[16] The majority labels these interests "primary" and considers this an approbation engendering special privilege. But the majority thereby runs headlong against the established law (without discussing it, or apparently even being aware of it since no party made such an argument) that the mere presence of lawful "primary" motives does not legalize an otherwise unlawful "secondary" motive (e.g., *NLRB v. Denver Bldg. Constr. Tr. Council*, 341 U.S. 675, 688-689 (1951). Passing through these labels, the basic point is that the interest of protecting union standards is found to outweigh the rights of subcontractors' employees to be free from top down organizing and the rights of the contractors to do business with whom they choose.

[17] *Truck Drivers Union Local No. 413 v. NLRB*, 334 F2d 539, 548, 55 LRRM 2878, 2884 (D.C. Cir 1964), cert den 379 US 916 (1964); *Heavy Highway Building and Construction Teamsters Committee*, 227 NLRB 269, 272, No. 27 (1976) ("[C]ontract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, are lawful. The underlying rationale for the lawful character of ... union standard clauses is ... to insure that negotiated standards will not be undermined."); *Local 437, IBEW (Dimeo Construction Co.)*, 171 NLRB 420, 421 (1969).

protected. As stated in the dissent below: "This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here." (Pet. App. A p. 110).

Since the protection of these jobsite interests can be achieved without forcing the top-down organizing of subcontractor's employees through boycotts, it follows that such interests cannot justify either the boycotts or their resulting top-down organizing—and such top-down organizing is thereby shown to be the real objective of this subcontractor clause.[18]

Connell recognized these points and is fundamentally contrary to the majority decision below. *Connell* did not seek justification in maintaining wage and benefit levels. The "close relationship between contractors and subcontractors at the jobsite" which *Connell* described (421 US at 629-630), was not fashioned in such terms or rooted in such considerations. Rather, *Connell* repeatedly referred to "'frictions that may arise when union men work continuously alongside nonunion men on the same construction site'" (421 US at 630), and to whether "Connell's employees [had] to work alongside nonunion men" (Id at 631), and to the Congressional Record which referred to the "same project ... [where] they work side by side" (Id at 630), and to Justice Douglas' *Denver* dissent which objected that "union men [should] not be compelled to work alongside nonunion men on the same job" (Ibid).

In short, the core of the reasoning of the majority below is in conflict with *Connell*. For nowhere does *Connell* frame the inquiry in terms of balancing *a policy of maintaining union standards* against employees' right of free choice—as did the majority below. Rather, *Connell* balanced the *policy of avoiding jobsite friction* against freedom from top-down organizing; or, more precisely, *Connell* found that Congress had struck that balance.

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[18] The majority below (at Pet. App. A p 87, n. 31) relies on *Donald Schriver, Inc. v. NLRB*, 635 F2d 859 (D.C. Cir 1980) on this point. This is, indeed, the central justification proposed by the *Schriver* opinion, which is in error for the same reason.

5. **The majority's reliance on § 8(b)(7) seriously misstates the applicable law and is contrary to *Connell*.** The majority below seeks to support its conclusion by stating that *Connell* is a narrow ruling which simply fills a "gap" in § 8(b)(7). The majority reasons that, since the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited by § 8(b)(7), so would have been unlimited if the subcontractor clause had not been found outside the construction proviso.[19] "The situation is quite different", the majority reasons, "when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation the union's coercive force is limited" (Pet. App. A pp 56-57).

This is wrong; and it is, again, contrary to *Connell*. A union which seeks a subcontractor clause in the context of a "collective bargaining relationship" can exert the same unlimited coercive force which *Connell* found unlawful.

Indeed, under settled law, Section 8(b)(7) has no significant bearing on the union's right to picket when a contractor declines to sign a subcontractor clause. It is settled law that even a union which does *not* represent an employer's employees can nevertheless, without violating § 8(b)(7) (or any other law), engage in informational picketing, indefinitely, to publicize the fact that the employer has no contract with the union. Such "informational" picketing is not prohibited by § 8(b)(7) and is lawful even if its ultimate objective is to force the employer to recognize and bargain with the union.[20] Furthermore, the union can lawfully decline to sign any contract that does not contain whatever form of subcontractor clause the union can lawfully require. Therefore, if the decision of the majority below stands, a "stranger" union may picket any unorganized employer indefinitely to inform the public that the employer has no contract with the union until the employer signs a contract containing this subcontractor clause.

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[19] Since the clause therefore violated § 8(e), the picketing in *Connell* was limited by § 8(b)(4)(A), which prohibits picketing to secure a clause which violates § 8(e).

[20] *Smitley v. NLRB*, 327 F2d 351, 352, 353 (9th Cir 1964) (Picketing held not to violate § 8(b)(7) even though "an object of the picketing was to secure recognition;" the court said: " ... This is normally the ultimate objective of any union in relation to an employer who has employees whose jobs fall within the categories of employment that are within the jurisdiction of the union ... "); *Barker Bros. Corp. v. NLRB*, 328 F2d 431 (9)th Cir 1964); and cases cited therein.

A union which represents the employees of an employer can exert the same unlimited force upon that employer, and can do so without any need to disclaim an immediate organizational objective. Such a union is wholly free of the restraints of § 8(b)(7).[21] The union can lawfully refuse to sign any contract with the employer and continue picketing indefinitely until the employer agrees to a contract containing the subcontractor clause.

Thus, the ruling of the majority below produces a result that openly defies *Connell*. The majority's rule permits the union to secure this top-down organizing subcontractor clause, which *cannot* be justified as a means of avoiding jobsite friction (since no such friction is possible in the absence of union employees on the jobsite), and which *connot* be justified as needed to maintain union standards (since union standards can be maintained by a lawful union standards clause), and which can be secured by perpetual picketing of any general contractor vulnerable to picketing. This is precisely the basic evil outlawed by *Connell*, which concluded:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing . . . " (421 US at 633)

3. The Board's recent brief to this Court in the Schriver case was unconscionably misleading.

The Board will doubtless oppose this petition, arguing in part that the Court's recent denial of certiorari in *Donald Schriver, Inc.* v. *N.L.R.B.*, 635 F2d 859 (DC Cir 1980), cert den _____ US _____ (May 1, 1981) (Supreme Court docket No. 80-1257), should also dispose of this case. However, a review of the Board's Brief In Opposition in *Shriver* reveals many serious errors which could have misled this Court when certiorari was there denied. We note them here to allow the Board full opportunity to respond.

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[21] Section 8 (b)(7) does not apply to a union which is the bargaining representative of the employer's employees.

The Board concedes the issue is important (Board's brief in Opposition in *Schriver* p 12). But it nevertheless argues against review because, it says, the decision below is correct and not inconsistent with ultimate rulings by other circuits (Ibid.). Although the latter point is technically accurate, the Ninth Circuit's original panel herein held to the contrary, and 6 out of the 13 judges eventually hearing this case below ruled to the contrary.

The Board's argument that the majority's decision below is correct contains many of that decision's own errors. However, to the extent these errors rest on a basic misunderstanding of elemental labor law (as most of them do) these errors are much more egregious for the Board, since the Board purports to hold out objective expertise in labor matters. Several of the most serious errors of the Board will be noted:

1. The Board's description of *Connell* in the Board's *Schriver* brief is not so much a description as a conclusionary assertion of the Board's own view of what it wants *Connell* to mean (Board's Brief in Opposition in *Schriver* pp 14, 17, 22). Nowhere does the Board review *Connell's* logic. Nowhere does the Board examine with any thoroughness *Connell's* examination of the proviso's purpose. The Board simply extracts one or two sentences (or mere portions of sentences) from their context, and then asserts the Board's own view that *Connell* means that broad subcontractor clauses are lawful whenever they are in a "collective bargaining relationship."

The Board presents no candid discussion of the broad top-down organizing which thereby results, even though in a vast multitude of cases no redeeming virtue can exist since no close jobsite relationship exists.

2. The central argument of the Board in *Schriver* was that "subcontracting agreements serve a much broader and more fundamental purpose [than avoiding jobsite friction]— i.e., protection of 'contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements (of the type here) were not allowed'" (Board's brief in opposition in *Schriver,* pp 20-21, quoting *Schriver).* We respectfully submit that such a representation by the Board is unconscionable. Any union contract standard involving any economic benefit can be lawfully protected by a primary union standards subcontractor

clause that does not even fall within the prohibition of § 8(e). As discussed above, this elementary rule has been repeatedly confirmed by the Board,[22] and by the courts.[23]

It is thus clear beyond dispute that, directly contrary to the Board's representation to this Court in *Schriver,* this type of subcontractor clause is not needed to protect union economic standards.

It is true that noneconomic provisions do not fall within the lawful protection of a union standards clause.[24] However, neither the majority below, nor the court in *Schriver,* nor the Board in its *Schriver* brief bases the justification for top-down organizing on the need to protect *non*economic contract standards. On the contrary, the majority below explicitly relied on "maintaining wage levels [and] protecting benefits such as pensions and paid vacations" —all of which are *economic* standards (Pet. App. A p 42); and both the *Schriver* court and the Board in its subsequent brief to this Court speak generally of "contract standards" which clearly encompass economic provisions as their principal elements.

If the Board seeks to justify the top-down organizing inherent in this subcontractor clause by its protection of union *non*economic standards then, at the least, the Board should say so. It should not represent to this Court, as it did in *Schriver,* that protection of *all* contract standards "would be unattainable" if subcontracting agreements "of the type here" were not allowed. This is utterly false. The Board in its own decision gave no such reason. Such dissembling to this Court is beneath the dignity of the Board—even as an expedient to protect its own strained and shakey decision.

3. The Board dissembled further in its argument in *Schriver* concerning § 8(b)(7) (Board's Brief in Opposition in *Schriver* pp 14-15). It argued, in effect, that the purpose of the *Connell* ruling was simply to fill a narrow "gap" in § 8(b)(7). It argued, in effect, that the *Connell* decision was caused by the inapplicability of § 8(b)(7)'s time limitations to Local 100's nonorganizational picketing of *Connell* (so, the Board argued, Local 100 could have

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[22] *Local 437, IBEW (Dimeo Construction Co.),* 171 NLRB 420, 421 (1969); *Heavy Highway Building and Construction Teamsters Committee,* 227 NLRB 269, 272, No. 27 (1976).

[23] *Truck Drivers Union Local No. 413, Etc. v. NLRB,* 334 F2d 539, 548 (DC Cir 1964), cert denied 379 US 916 (1964).

[24] *Teamsters, Local 386 (Construction Materials Trucking),* 198 NLRB No. 129, 81 LRRM 1109, 1110 (1972).

continued picketing indefinitely if *Connell* had not found the clause outside the proviso and therefore within § 8(e)'s prohibitions and therefore within § 8(b)(4)(A)'s prohibitions against picketing to secure a contract that violates § 8(e)); whereas (the Board argued) picketing to secure a subcontractor clause in a "collective bargaining relationship" is limited by § 8(b)(7) so there is no need to have § 8(e) apply and so *Connell* is inapplicable here (Ibid). We have already shown (above) that the law is to the contrary and that *Connell* contains no such analysis. The point here is that the Board, in its expertise, is fully aware of this. Yet the Board presented this argument to this Court. The *Schriver* court made such an assertion in its long and argumentative opinion, and the majority below erroneously followed. But this does not justify the Board, with its full expert knowledge, in misrepresenting the established law to this Court.

4. The Board argued in *Schriver* that the legislative history "makes it clear" that the purpose of the proviso was not to avoid jobsite friction but to preserve the "pattern of bargaining" in the construction industry (Board's Brief in in Opposition in *Schriver* p 20). But the Board's own General Counsel has previously found that there was no "pattern of bargaining" in the construction industry,[25] and explicitly criticized the very study (by Lunden) now resurrected and relied on by the Board on this point.[26] Furthermore, *Connell* dismissed these legislative remarks as "bare references" (422 US at 628), and its analysis of the proviso's purpose disregards them. As previously shown, there is extensive authority— including statements of the Board itself—that the purpose of the proviso was to avoid jobsite friction (see note 9, supra). For the Board to now argue that the legislative history "makes it clear" to the contrary is again, and at best, a misleading statement to this Court.

5. Finally, the Board asserts "'it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite'"—again borrowing from *Schriver*

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[25] 1976 Lab Rel Yearbook (BNA 1977) 295, 309; 93 Lab Rel Reporter 390, 404.

[26] The General Counsel stated that the Lunden study was "inconclusive" and added:

"[T]he only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform practice in the industry, it would appear that there was no such pattern" (1976 Lab Rel Yearbook (BNA 1977) 295, 309).

(Board's Brief in Opposition in *Schriver* p 21). As previously noted, this argument is baseless and the Board in its expertise must know it. No party herein has suggested that separate agreements need be bargained for each jobsite. And this is so regardless of the form of the subcontractor clause. All that is sought is a subcontractor clause which is limited to jobs where friction can occur; or, in Justice Douglas' phraseology, a subcontractor clause under which "union men [will] not be compelled to work alongside nonunion men on the same job" (dissent in *Denver,* 341 US at 692).

6. Nowhere in its brief to this Court in the *Schriver* case did the Board candidly face the simple central issue in this case, which is: Does the proviso's purpose justify the broad top-down organizing of these clauses which are applicable at all times to all jobs, simply because the union represents (or claims to represent) one or more of the general contractor's employees on some job at some time? Yet it is *this* issue which is fundamental and which this Court should decide.

CONCLUSION

The petitions for a writ of certiorari should be issued to review the judgment of the U. S. Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,
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NO. 80-1808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE
ASSOCIATED BUILDERS & CONTRACTORS, INC.

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT

REPLY BRIEF OF PETITIONER PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

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ARGUMENT

This brief responds to the brief of the National Labor Relations Board in opposition filed in No. 80-1808.

This response will deal with two subject matters. First will be to discuss the importance to the construction industry of a grant of a writ of certiorari. Second will be to discuss the substantive opposition of the Board.

I.

The Importance of Granting A Writ of Certiorari

The issue in this case, lawfulness of a massive restraint upon subcontracting within the construction industry, has national application. It will effect every job site nationwide; it will have dramatic impact within the process of future collective bargaining and it will create national labor unrest when employers refuse to acquiesce in a bargaining demand for inclusion of subcontracting restraints within their collective bargaining agreements.

The consumer will predictably suffer higher cost of construction. Incremental cost increase will be the by-product of a lack of competition between contractors

because of this arbitrary contractual disqualification.

The sword thrust of this decision slices deep into the heritage of the American economy. It violates the precepts of the Sherman Act. It frustrates the rights of employees bestowed by the National Labor Relations Act. Concepts of industrial due process are transgressed. It is thus ironic that unless this Court grants certiorari, the decision of the Board with its sweeping implications, will become the law of the land by default.

Only the General Counsel's office has authority to issue complaints. This authority is exclusive and unreviewable. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-139 (1975). No case can be considered by the Board or by any Court, absent issuance of a complaint by the General Counsel's office. In consequence of the Board's decision here, the General Counsel discontinued issuance of complaints in November, 1978.

Unless this Court grants the Petition, no court will be permitted to review the fundamentally important questions presented. The law of the Board will be the law of the land. The office of a writ of certiorari is to prevent this very occurrence. It is precisely this type of case

in which review[1] by the Supreme Court is most appropriate.

II.

The Substantive Analysis of the Board Is Without Merit

The Board's argument contains five components:

A. The construction industry proviso is intended to meet two objectives:

1. Avoidance of friction that may arise between union and nonunion workers who work shoulder-to-shoulder; and

2. Maintenance of wage and fringe benefit levels. (Board Brief, p. 8);

B. That a contrary decision would create "immense practical problems" (Board Brief, p. 9);

---

[1]Since the filing of the Petition for Certiorari, three per curiam decisions involving the same issue have been handed down by the Ninth Circuit on a per curiam basis. They are Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, Case No. 79-7330 (combined with cases 79-7340 and 79-7355)); Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, Case No. 79-7341 (combined with cases 79-7331 and 79-7369); and Swanson-Dean Corp. v. Carpenters, ___ F. 2d. ___, 107 LRRM 2612 (9th Cir. 1981). Counsel for petitioner is attorney in cases 79-330 and 79-7341. Whether a Petition for a Writ of Certiorari will be filed in these cases is dependent upon the Court's determination here.

C. That the Section 8 (e) proviso was intended to preserve the "pattern of bargaining" within the construction industry (Board Brief, p. 9);

D. That a single sentence extracted from Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) mandates the conclusion sought by the Board (Board Brief, p. 10); and

E. That the limited evil which the Supreme Court in Connell sought to eradicate was to close a loophole in Section 8 (b) (7). (Board Brief, p. 11)

None of these arguments furnish support to the conclusion of the Board or the Court of Appeals. Each are flawed by a lack of careful analysis.

A.

The Objective Of the 8 (e) Proviso

The Board urges that Congress had two purposes in mind when the proviso to 8 (e) was enacted. The first, and primary purpose, was avoidance of job-site friction which would be promoted by union and nonunion employees working side-by-side. The second is maintenance of "union standards."

While this Court in Connell appears to have concluded that the sole objective of the proviso to Section 8 (e) was avoidance of friction, even a duality of objective would not save the restraint here.

It has been commonplace for this Court to analyze restraints in terms of whether a legitimate objective could be achieved

through less restrictive means. This is the litmus test for rule of reason anti-trust scrutiny. Siegel v. Chicken Delight, Inc. 488 F. 2d. 43, 51 (9th Cir. 1971), cert. den., 405 U.S. 955 (1972); Copper Liquor, Inc. v. Adolph Coors Co., 506 F. 2d. 934, 942-43 (1975). It has also been invoked as part of a balancing test in weighing First and Fourteenth Amendment rights against Section 7 requirements of the National Labor Relations Act. Hudgens v. NLRB, 424 U.S. 507 (1976).

There are two types of restraint on subcontracting. The first is a "union signatory" clause. Under such subcontracting restraint, the employer may deal solely with an employer who has contracted to adhere to each and every term of a collective bargaining agreement, including both its economic and its noneconomic provisions.

The second type of restraint is what is know as a "unions standards" agreement. Under the terms of this type of restraint, a subcontractor can be employed only if it matches the economic provisions of the industry's area collective bargaining agreement. This latter category of agreement contains no complusion to join any union but merely assures that competition between contractors will not be based upon substandard wages and/or working conditions.

It should be apparent that if Congress intended the 8 (e) proviso to promote dual objectives, such a purpose could be satisfied by a less restrictive area standards subcontracting provision coupled with a prohibition upon subcontracting to nonsignatory contractors at job sites when employees of signatory

contractors performing jurisdictionally similar work are contemporaneously present. To permit broader language than appropriate to satisfy the limited objectives of the statute, is to trample upon Section 7 rights of employees.

B.

There Are No Insurmountable Or Immense Practical Problems That Would Result From Declaring The Subcontracting Provision To Be Unlawful

The Court of Appeals stated that limiting subcontracting agreements to instances where job-site friction will arise creates immense practical problems. (Board Brief, p. 9)

This pragmatic argument was not one which the Board considered, nor was it part of its decision-making process. It was manufactured from whole cloth by the Ninth Circuit without benefit of written or oral argument. The term "make weight" seems most apt.

At no time has ABC contended that there should be "job-site-by-job-site" negotiation of collective bargaining agreements. It is a simple matter to write a collective bargaining agreement to conform to the objective of the proviso. There is no logical reason why the duration of such an agreement must be limited to specific projects. It, like all others, could be written for an extended term.

The Board and the Ninth Circuit also urged that the "shoulder-to-shoulder" test must be disregarded because of difficulty in policing job sites to determine whether there was "any union worker" on the job

site at any time. The contention is plain nonsense. First, a member of a union may work for a union or a nonunion contractor. The fact of membership in a union does not foreclose working for a nonunion contractor. Free choice is one of the underlying tenets of the Act. The problem then is commingling of union members employed by a contractor privy to a collective bargaining agreement with a union and the employees of a nonunion contractor. This is the theoretical caldron of boiling oil.

Typically unions call for and have pre-job conferences with the employer. During the pre-job conference the identity of each subcontractor is disclosed. The projected timing of the presence of each subcontractor on the job site is disclosed. The employer may be requested to give the union specific written advance notice of when nonunion contractors will be present. Thus the union knows or has the means to know when a nonunion contractor will be present on the job site.

This is a simple extension of boiler plate secondary boycott dogma. Common situs picketing is proper only when the employees of the primary employer are present.[2] To assure that informational picketing does not lapse into secondary, the general contractor provides advance written notice of when the primary contractor and his employees will be working on

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[2] Carpenters Council of Milwaukie, 196 NLRB 487, 490, No. 60 (1962), Local Union No. 519, United Association of J A of Plumbers, Inc. v. NLRB, 416 F. 2d. 1120, 1124-1146 (D.C. Cir. 1969).

the job site. Thus avoidance of job site friction and of the effects of informational picketing upon neutral employees has produced a practical convention which may be applied, without change, to subcontracting with nonsignatory subcontractors.

Additionally, construction industry unions have historically policed the job site for a variety of purposes. One purpose has been compliance with a labor contract. The second has been to ascertain the presence of a nonunion contractor so that direct informational pickets may be erected. A declaration that subcontracting restraints in the AGC/701 agreement were unlawful would not change this "policing" aspect of their long-standing relationship one iota.

Even if it were assumed that escalated policing would be required, what does this mean? It suggests the absence of friction at the job site. It suggests that union and nonunion workers can and do work side-by-side without antagonism. It appears, however, that this conclusion is legislatively foreclosed and it must therefore be conclusively presumed that the mixing of oil and water at the job site will indeed produce immediate input to the union from enraged union workers and an appropriate response.

C.

The Board's "Pattern of Bargaining" Argument Is Inconsistent With This Court's Connell Analysis.

The Board promotes a simple syllogism:

1. There was a pattern of bargaining in 1959.

2. Congress intended the 1959 amendments to preserve the pattern of bargaining.

3. Therefore, each and every form of restraint upon subcontracting predating 1959 is lawful. Like may syllogisms, the conclusion is only as sound as its minor and major premise.

The minor premise is that there was a pattern of bargaining. As proof, the Board now proffers the Lunden Report.[3]

Curiously, in rushing to this conclusion the Board fails to reflect upon at least three impediments. First, the Board's own General Counsel, after conducting a painstaking investigation of the construction industry and the usage of subcontracting clauses in 1959, concluded:

> "* * * Moreover, the study did not deal with the precise issue involved herein, viz., whether and to what extent there existed 'particular union' subcontracting clauses in the construction industry in 1959."
>
> Labor Relations Yearbook (1976), p. 308.
>
> "In view of the fact that the Lunden study was inconclusive on the instant issue, the Office of the General Counsel undertook its own study of construction

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[3]"Subcontracting Clauses In Major Contracts: by Leon E. Lunden, pp. 579-586 and 715-723.

> industry clauses existing in 1959. * * *"

ibid. pp. 308-309.

> "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic * * *. * * *" (Emphasis Added)

ibid. p. 309.

Second, this Court in Connell rejected the identical argument. It concluded that rather than to constitute an adoption of the common law of bargaining Congress instead intended the proviso to be a "partial substitute" for an attempt to overrule this Court's decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951); Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 95 S. Ct. 1830, 1838 (1975).

Third, the argument proves too much. General Counsel has previously acknowledged that agreements of the sort present in Connell were part of the 1959 mosaic. If such were true, then either the Connell decision cannot stand or the Board is wrong. Labor Relations Yearbook (1976), p. 309.

D.

The Mysticism of Sentences Out Of Context

The Board, by seizing language out of context from the Connell decision asserts that any and all restraints upon subcontracting if obtained in the context of collective bargaining are lawful.

To support this proposition it quotes the following passage from Connell:

> "* * * Its (the 8 (e) proviso) authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the Denver Building Trades problem, possibly to common site relationships in particular jobsites as well."

The Board reads this phrase in the disjunctive. It thus asserts that all restraints on subcontracting in the context of collective bargaining are lawful. It further urges that even in the total absence of a collective bargaining relationship, that restraints on subcontracting are lawful provided the common situs Denver Building Trades type relationship is present on a specific job site.

The Opinion of this Court, however, cannot be understood by slicing a single sentence from it and totally ignoring the context within which it was presented. It is apparent that this Court meant the phrase to be read in the conjunctive and that secondary restraints on subcontracting would be construed as lawful only when:

1. They were negotiated in the context of a collective bargaining relationship; and

2. They cured common site friction on particular job sites.

E.

The Purported 8 (b) (7) Loophole Furnishes No Support To The Board

The Board postulates that the collective bargaining agreement in Connell was sui generis; that picketing to obtain it would not be interdicted by 8 (b) (7); and that therefore this Court crafted an 8 (e) remedy.

The premise of this argument is that 8 (b) (7) regulates solely primary picketing, i.e., that which is addressed to the relationship of the employer and employee being picketed. The words of 8 (b) (7) do not lend support to this contention. The prefatory words to the statute interdict picketing

> "* * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization. * * *"

If it had been the intent to limit the scope of 8 (b) (7) to primary picketing, the article "the" would have been used in lieu of "and".

Second, this construction comports with common sense. Congress could not have intended to condemn organizational and recognitional picketing in its primary sense but not have granted relief from the

effect of the economic leverage of a general contractor, enlisted by the union, to compel a third party subcontractor to recognize and deal with the labor organization.[4]

Third, the Board has recognized the broad remedial scope of 8 (b) (7). For example, the General Counsel's office has interpreted 8 (b) (7) to interdict all forms of picketing to achieve a prehire agreement. Such agreements are executed prior to the time that an employer has any employees on its staff. It is free to choose to hire through the union hall, or alternately, may choose to subcontract the work to a third party.

As the General Counsel's office concluded:

> "* * * Where a construction industry employer has no unit employees or less than a representative complement, and a union pickets to obtain an 8 (f) contract, it is our view that since a question concerning representation could not be raised and an expedited election could not be held, such picketing would be violative of Section 8 (b) (7) (C) from the first day. * * *."
>
> Labor Relations Yearbook (1979), p. 354.

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[4]This is the obverse side of the 8 (b) (4) coin which condemns picketing where the object is to force a neutral not to do business with the primary employer. Here the secondary employer is being deployed as an organizational tool to permit continuation of business relationship.

The above factors make it reasonable to conclude that 8 (b) (7) does provide remedies against secondary as well as primary picketing to obtain an organizational and/or recognitional purpose.

Even if this were not true, the Board's assertion that the evil which the Connell court sought to address is not present in the context of the collective bargaining relationship simply is a misstatement. (Board Brief, p. 10) The overriding concern of the Court was utilization of a tactic which compelled organization upon third party employers and employees. It was this evil which dominated the Court's thinking. The effect of top-down organizing on third parties is the same whether there be a collective bargaining relation between the union and the immediate employer.

CONCLUSION

The parties concede that the issues tendered are of national importance. The parties concede that they have an impact upon virtually every segment of the national economy. The parties must concede that the issues are rife with antitrust overtones and the economic implications which radiate from it.

The issues are ripe for decision. The record presents no fact controversy. It is indeed the last opportunity that this Court will have on any record to consider the

issue. It is respectfully submitted that this Court should grant certiorari to review each question.

Respectfully submitted,

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and

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Associated General Contractors of America, Inc. ("AGC") respectfully moves this Court, pursuant to Supreme Court, Rule 36(1), for leave to file the accompanying brief in this case as *amicus curiae* in support of the petition for certiorari. In support of this motion, AGC shows as follows:

1. This motion is necessitated by the refusal of the International Union of Operating Engineers, Local No. 701, to consent to the filing of a brief by AGC as *amicus curiae,* notwithstanding that the Government by the Solicitor General, has provided his written consent to the filing.

2. AGC is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

3. The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry, including the filing of a brief *amicus curiae* with the Ninth Circuit in the case now before this Court.

4. The specific question presented by this case is whether the partial *en banc* panel of the Court of Appeals for the Ninth Circuit erred in concluding that the construction industry proviso to Section 8(e) of the National Labor Relations Act (29 U.S.C. §158 (e)) protects any restrictive subcontractor clause agreed to in a "collective bargaining relationship" notwithstanding that the clause allows substantial top-down organizing without avoiding jobsite friction between union and non-union workers.

The resolution of this question by this Court is particularly vital to the AGC and its members. The employees of many AGC members are represented by building and construction trades unions who constantly seek agreement upon restrictive subcontracting clauses. Indeed, almost all such restrictive subcontracting clauses in the construction industry are sought by unions from general contractors, rather than from subcontractors, and AGC's general contractor members number approximately 80% of the construction general contractors in the country. Accordingly, no prospective *amicus* can be more directly affected by this issue than the AGC.

Further, AGC and its members are vitally concerned that the legality of such restrictive subcontracting clauses be settled by this Court. Until this Court rules, general contractor members of AGC throughout the country will be confronted by union demands, often supported by strike action, to agree to subcontracting terms which not only may violate Section 8(e) of the National Labor Relations Act, but also may subject those contractors to triple damage antitrust liability. *See Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616 (1975).

The resulting disruption of collective bargaining and of the business of construction, as well as the untenable dilemma faced primarily by AGC general contractors, has prompted this request to file a brief *amicus curiae* urging this Court to grant the instant Petition for Certiorari. AGC respectfully submits that it is in a unique position to present argument and analysis on behalf of the construction industry in assisting this Court in its consideration of the pending Petition for Certiorari.

WHEREFORE, it is respectfully moved and requested that the AGC be granted leave to file the accompanying brief as *amicus curiae*

Respectfully submitted,

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Nash, Peter G., *Connell "Hot Cargo" Agreements: The Supreme Court As Interpreted By The N.L.R.B.*, 83 Dickinson L.Rev. 661 (1979) 7, 9

NLRB General Counsel's Memorandum on Connell, 1976 Lab. Rel. Yearbook 295 (BNA, 1977) 8

St. Antoine, *Connell: Anti-trust Law At The Expense Of Labor Law*, 26 Va.L.Rev. 603 (1976) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petition filed in No. 80-1808 for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 17, 1981.

INTEREST OF THE *AMICUS CURIAE*

A statement describing AGC and its interest in this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

REASONS FOR GRANTING THE WRIT

A. Failure To Review The Important Issues In This Case Now Will Result In Significant And Irreparable Disruption In The Construction Industry.

The importance of this case and the need for prompt review of the Ninth Circuit's decision by this Court cannot be overstated. No one, including the Ninth Circuit, the National Labor Relations Board, nor any of the other parties to this litigation claims that this is not an important labor case.[1] Further, in light of this Court's decision in *Connell Construction Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616 (1975), this is also a case with critical implications in the field of antitrust law.

It is evident from the filing of this *amicus* brief in support of a petition for certiorari, that the AGC believes that the Ninth Circuit wrongly decided this case. That conviction flows from the fact that the Ninth Circuit's decision, supporting a decision of the National Labor Relations Board, allows the use of restrictive subcontracting clauses[2] for massive top-down organizing

[1] The Board devoted an entire day to permit the various interested parties in four related cases to orally argue the legalities and practical ramifications of the controversial issues involved in this case. In addition, the majority opinion of the Court of Appeals at the beginning of its *en banc* decision specifically noted the importance of the issue. *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065, 2066 (9th Cir. 1981).

[2] Although restrictive subcontracting clauses in the construction industry vary from one labor-management agreement to another, the kind of clauses involved in this cases have a common theme: they commit the general construction contractor to subcontract no on-site construction work to any subcontractor unless that subcontractor's employees are covered by a union contract. Such clauses are normally called "union signatory" clauses, and violate Section 8(e) of the National Labor Relations Act (29 U.S.C. §158(e)) unless they meet the requirements of the so-called "construction industry proviso" in Section 8(e). *Pacific Northwest Chapter of ABC* v.

by construction unions in direct conflict with this Court's reasoning in its *Connell* decision.[3] Given the massive top-down organizing potential of such clauses under the Ninth Circuit's and NLRB's decisions (discussed more fully below), it is likely that this court will some day reverse the Ninth Circuit's decision in this case. The question before the Court today, however, is whether the Court should decide that issue now in this case or wait and decide it at some future date.

It is the AGC's position that the Court should grant the instant petition for certiorari and decide this issue now. Substantial dislocations within the construction industry will result if the Court defers to another day a decision on this important issue. Thus, supported by the Ninth Circuit's decision in this case,[4] it is reasonable to anticipate that construction unions nationwide will seek these restrictive subcontracting agreements in futherance of their attempts to "top-down" organize construction workers. If those bargaining efforts include strikes or picket lines to obtain such agreements, which is likely

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N.L.R.B., _____ F.2d _____, 107 LRRM 2065, 2069 (9th Cir. 1981). Whether or not the *proviso* requirements are met depends upon how this Court's decision in *Connell* is read and interpreted — and that is the issue in the instant case.

[3] "Top-down organizing" is a term which generally describes union efforts to gain new members by requiring an employer to recognize the union as the representative of his employees, thereby unionizing those employees without the need for the union to organize them directly. Restrictive subcontracting clauses have this "top-down organizing" effect because they require that all subcontractor-employers recognize a union as the representative of their employees.

[4] The District of Columbia Court of Appeals has come to a similar conclusion. *Donald Shriver, Inc.* v. *N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3825 (1981).

given their great potential for organizing nonunion workers,[5] construction contractors will be confronted with an impossible choice — sign an agreement containing what may be an antitrust violative, restrictive subcontracting clause, or suffer the consequences of a ruinous strike. No other viable options are available. Thus, a contractor may file unfair labor practice charges with the NLRB alleging a violation of Section 8(b)(4)(A) (29 U.S.C. §158(b)(4)(A)) and request that an injunction against such picketing or strike activity be sought pursuant to Section 10(1) of the National Labor Relations Act. (29 U.S.C. §160(1)). However, as the NLRB has already found such agreements to be lawful, the Board's General Counsel will decline to issue a complaint or to seek an injunction against the continuing strike or picketing activity.[6] Nor does it appear that a contractor, confronted with such a strike or picketing, may commence a declaratory judgment action under the antitrust laws and seek injunctive relief to stop such picketing or strikes.[7] Thus, the contractor's options are

[5] The *Connell* case itself involved a picket line to obtain such a clause.

[6] Indeed, it was the failure of the NLRB's General Counsel to issue complaints alleging violations of Sections 8(b)(4)(A) and 8(e) which resulted in the *Connell* case coming to this Court as an antitrust action rather than as a labor case. *See Connell, supra,* 421 U.S. at 631 n.10 (There the Court discussed the General Counsel's so-called *Hagler Memorandum* in which the General Counsel had refused to issue complaints alleging 8(e) violations).

[7] This Court in the recent case of *M.A. Artists & Associates Inc., et al.* v. *Actors Equity Association et al.*, _____ U.S. _____ (issued May 26, 1981), 107 LRRM 2394, reaffirmed the principle that the Norris-LaGuardia Act precludes federal courts from granting injunctions in the context of labor disputes notwithstanding the claim of an unlawful combination or conspiracy. In *Milkwagon Drivers Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103 (1940) this Court stated: "For us to hold, in the face of [the Norris-LaGuardia Act], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would

either to sustain a strike, which may well jeopardize the contractor's ability to stay in business, or sign an agreement which includes an illegal subcontracting clause.[8] If the contractor wishes to remain in business and, thus, agrees to the clause, it has but two options. The contractor may simply abide by that subcontracting clause and await triple damage antitrust actions by nonunion subcontractors who have been contractually excluded from the contractor's construction jobs,[9] or it may commence an antitrust action, as did *Connell*,

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run counter to the plain mandate of the Act and would reverse the declared purpose of Congress." *See also Utilities Services Engineering, Inc.* v. *Colorado Building & Construction Trades Council*, 549 F.2d 173 (10th Cir. 1977).

[8] In view of the Board's expansive reading of the construction industry *proviso*, unions have the present right to insist on the inclusion in a collective bargaining agreement of such a subcontracting clause, because the Board treats such a clause as a mandatory subject of bargaining. *See e.g., International Hod Carriers, Local 1082 (E.L. Boggs Plastering Co.)*, 150 NLRB 1958 (1963), *enf'd*, 384 F.2d 55 (9th Cir. 1967) *cert. denied*, 390 U.S. 920 (1968) (No violation of Section 8(b)(3) (29 U.S.C. §158(b)(3)) of the NLRA by union striking to obtain a subcontracting clause permitted by the construction proviso).

Further, although serious question exists as to whether the NLRB and circuit courts have correctly interpreted the Act, the present law is that construction unions may strike and picket to obtain lawful 8(e) proviso clauses despite legislative history indicating that Congress intended to privilege only voluntary restrictive subcontracting agreements. This Court could substantially assist contractors in avoiding the dilemma outlined in the text above, if it also grants certiorari in the companion to this case, *Woelke & Romero Framing, Inc.* v. *N.L.R.B.*, No. 80-1798, and determines that unions may not use economic pressure to support their demands for even lawful 8(e) construction proviso clauses. See the excellent *amicus curiae* brief of the Chamber of Commerce of the United States of America in support of the petition for certiorari in No. 80-1798.

[9] The filing of such suits have been an all too frequent occurrence in recent years. *See e.g., Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d

seeking to enjoin the operation of the illegal subcontracting clause.[10] However, at least in the Ninth and District of Columbia Circuits, the contractors' declaratory judgment action will now fail, given the agreement by those two Circuits with the NLRB's erroneous interpretation of this Court's *Connell* decision. Accordingly, contractors will be subjected to

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1368 (3rd Cir. 1979); *Consolidated Express, Inc.* v. *New York Shipping Association, Inc.*, 602 F.2d 494, 511 (3rd Cir. 1979), *vacated on other grounds*, _____ U.S. _____, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980); *Commerce Tankers Corp.* v. *National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977); *James Julian, Inc.* v. *Raytheon Company*, 499 F.Supp. 949 (D.Del. 1980); *Landscape Specialties, Inc.* v. *Laborers' International union*, 477 F.Supp. 17 (C.D.Ca. 1979).

[10] The general contractor does not have a realistic option to simply ignore the unlawful clause and subcontract his work to non-union firms, for he could be liable to union members for an amount equivalent to the wages and fringe benefits which would have been earned by them had the work been subcontracted to union firms. Such claims are enforceable by means of a "Section 301" suit (29 U.S.C. §185) to confirm a favorable arbitration award rendered on behalf of the Union. *See, Orange Belt District Council of Painters* v. *Maloney Specialties, Inc.*, _____ F.Supp. _____, 98 LRRM 3191 (C.D.Ca. 1978), *affirmed*, 639 F.2d 487 (9th Cir. 1980); *In re Bullard Contracting Corporation*, 464 F.Supp. 312 (W.D.N.Y. 1979). The standard of review by federal courts of arbitration awards is narrow and the interpretation of labor arbitrators will not be disturbed so long as they do not manifest an infidelity to the agreement. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Alyeska Pipeline Service Co.* v. *International Brotherhood of Teamsters*, 557 F.2d 1263, 1267 (9th Cir. 1977). In addition, the contractor will not be permitted to raise the defense of the illegality of the clause in a Section 301 action because a majority of circuit courts will require that any such challenge to the subcontracting provision be initially made in an unfair labor practice proceeding before the NLRB. *See Orange Belt District Council, supra* at 2187; *Waggoner* v. *McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979); *Mullins* v. *Kaiser Steel Corp.*, _____ F.2d _____, 105 LRRM 2579 (D.C. Cir. 1980); *Huge* v. *Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

antitrust suits and potential damages running into the billions of dollars. For many contractors, that will simply mean bankruptcy. In addition, most construction contracts require the posting of bonds by contractors.[11] But contractors faced with potential massive antitrust and Section 301 liability may find it difficult, if not impossible, to obtain such bonding, with the result that many will be effectively forced out of business simply by reason of pending antitrust actions.

Thus, the AGC, an organization representing major general contractors throughout the country, respectfully urges that this Court grant the pending petition for certiorari in this case and decide the issue now. Even if this Court ultimately sustains the Ninth Circuit's decision in this case, a prospect we deem unlikely, it will have done a great service to the construction industry for it will have eliminated the uncertainty which now exists and the very real concern of construction contractors throughout the country that restrictive subcontracting clauses, similar to those involved in this case, may subject them to possible ruinous antitrust damages.[12]

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[11] *See e.g.*, 41 C.F.R. §§1.10.104.1 and 1.10.105.1 (requiring performance and payment bonds on all federal construction contracts in excess of $25,000).

[12] The confusion of contractors and their legal advisors when confronted with union demands for broad subcontracting clauses is readily understandable. First, commentators in the field of labor and antitrust law have expressed widely divergent views on the impact of the *Connell* decision on subcontracting clauses which attempt to embrace situations where union employees are not found to work alongside nonunion employees. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 26 Va.L.Rev. 603 at 619; Janofsky & May, *Connell — Consistent with Past, Indicative of Future*, Proceedings of NYU, Twenty-ninth Annual Conference on Labor; 21-22 (1976); Nash, *Connell "Hot Cargo" Agreements: The Supreme Court as Interpreted by the N.L.R.B.*, 83 Dickinson L.Rev. 661 (1979). Second, the NLRB General Counsel interpreted

In sum, great harm will be done to construction contractors and particularly general contractors nationwide if the Court waits to decide the issues presented in this case. Accordingly, we respectfully request that the Court decide them now.

B. The Ninth Circuit's Decision Legalizes The Use Of Restrictive Subcontracting Agreements As Massive Top-Down Organizing Weapons Of Construction Unions In Direct Violation Of Congressional Intent As Interpreted By This Court In Its *Connell* Decision.

This Court, in its *Connell* decision, characterized restrictive subcontracting clauses in the construction industry as tools for "top-down" organizing that are used in an effort to force union recognition by construction subcontractors.[13] This Court went on to find that the Congress had intended to limit the "top-down" organizing effects of such subcontracting clauses and accordingly, that such clauses were to be lawful under the Section 8(e) construction proviso only in limited circumstances.

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this Court's *Connell* decision in a manner radically different from the NLRB's and circuit courts' decisions in this and companion cases. *NLRB General Counsel's Memorandum on Connell*, 1976 Lab. Rel. Yearbook 295 (BNA, 1977). Moreover, numerous lower courts have differed in their approach to the underlying issue. Thus, several district courts have found that subcontracting clauses which were not restricted to eliminating jobsite friction between union and non-union workers on a specific job are not protected by the construction proviso. *Squillacote* v. *Racine Building & Construction Trades Council, AFL-CIO*, 483 F.Supp. 1218 (E.D.Wis. 1980); *James Julian, Inc.* v. *Raytheon Company, supra; Long* v. *Floorcraft Carpet Co.*, (not officially reported) 95 LRRM 3143 (D.Ore. 1977); *Long* v. *Pam's Carpet Service Inc.*, (not officially reported) 95 LRRM 3145 (D.Ore. 1977); *Operating Engineers* v. *Neilsen & Co.*, (not officially reported) 92 LRRM 2861 (D.Id. 1975). Compare, *Signatory Negotiating Committee* v. *Operating Engineers Local 9*, 447 F.Supp. 1384 (D.Colo. 1978).

[13] 421 U.S. at 625.

This Court then set forth at least three requirements which must be met in order for a restrictive subcontracting clause to be lawful under the Section 8(e) proviso.[14] First, the Court required that such a clause be negotiated within the context of a collective bargaining relationship between the general contractor and the union seeking the clause. Second, the clause's restriction on subcontracting had to be limited to a single jobsite, not only in the sense that it must cover a specific job but also that the clause not require that any subcontractor be signatory to a union contract on other than that specific jobsite.[15]

Third, and finally, the subcontracting clause must meet the basic purpose underlying the construction industry proviso to Section 8(e). That purpose, as stated by this Court in *Connell* and by the NLRB in subsequent decisions, was a "desire to prevent potential union strife between union and nonunion personnel working at the same jobsite."[16] That purpose could be met only if the restrictive subcontracting clause applied on a job where the contracting union's members were to be working and required that all employees working at the jobsite be union represented. Further, that purpose could be met if the restrictive subcontracting clause prohibited

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[14] For a more detailed analysis of these three requirements, see Nash, *Connell "Hot Cargo" Agreements, supra,* n.12.

[15] Accordingly, the restrictive subcontracting clause could not require that a subcontractor be signatory to a union agreement covering all jobs on which he works but may require only that that subcontractor be a union signatory on the specific job covered by the restrictive subcontracting agreement.

[16] Just this past year, the NLRB in *Joint Council of Teamsters No. 42, et al. (Associated General Contractors of California, Inc.),* 248 NLRB 808 (1980), restated its often expressed view that the primary purpose of the construction industry proviso was "to avoid tensions among groups of employees at the same site." *Id.* at 815.

subcontracting of on-site work to nonunion employees and there was no need for the clause to specify any particular union or unions with whom the subcontractor must have a relationship. Indeed, to allow the specification of particular unions would not only severely impinge upon the right of employees to select or reject unionism generally (a restriction of employee rights which always exists when even a valid restrictive subcontracting clause is in effect) but also eliminates the right of employees to select which union they wish to represent them — a restriction totally at odds with the basic purposes of the National Labor Relations Act and unnecessary to meet the basic purpose of the 8(e) construction industry proviso.

As shown by the analysis which follows *all* three of these requirements must be met in order for a restrictive subcontracting clause to be valid under the Section 8(e) proviso. Indeed, only a clause meeting all of these requirements will both fulfill the purpose of the 8(e) proviso, and, at the same time, accomodate Congress' concern that such clauses not be used as massive top-down organizing techniques which unduly and unnecessarily impinge upon the rights of employees to select whether or not they wish to be represented by a labor organization. The following example is illustrative:

Assume the Laborers Union has a collective bargaining relationship with a general contractor and obtains agreement upon a clause restricting subcontracting on one particular job where Laborers Union members will be working to subcontractors who have union contracts. Assume that five subcontractors are hired by the general contractor and all of those subcontractors sign collective bargaining agreements with unions. The original restrictive subcontracting clause

would be lawful for it was bargained as part of a collective bargaining agreement, it related only to a particular job, and it met the purpose of the Section 8(e) proviso by protecting unionized laborers who would be working on that job from having to work alongside any nonunion labor. In addition, however, the restrictive subcontracting clause in this hypothetical could not be used as a massive organizing weapon. Each of the subcontractors on the job were required to sign a union contract covering only that job. The restrictive subcontracting clause in this hypothetical did not require that those subcontractors sign an agreement with any particular union, thereby leaving the employees of these subcontractors some choice regarding which union they wished to represent them. The net result is that, at most, five employee units of nonunion subcontractors would be covered by union agreements, with the employees having a choice of representative.

On the other hand, the NLRB[17] as well as the District of Columbia and Ninth Circuits[18] have interpreted this Court's *Connell* decision differently, and, in doing so, have sanctioned the use of restrictive subcontracting clauses for massive top-down organizing purposes. Thus, the Board and Circuits have concluded that a restrictive subcontracting clause is valid if it *either* arises from a collective bargaining relationship *or* it meets the basic purpose of the Section 8(e) proviso. Further, the Board and Circuits have concluded that a restrictive subcontracting clause remains valid even

[17] *Woelke & Romero Framing, Inc.*, v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065, 2066 (9th Cir. 1981); *Utilities Services Engineering, Inc.*, 239 NLRB 253 (1978); *Sullivan-Kelley Associates*, 239 NLRB 264 (1978); *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, *supra*.

[18] *Donald Schriver, Inc.* v. *N.L.R.B.*, *supra*; *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, *supra*.

though it restricts subcontracting to employers signatory to agreements with specific unions (e.g. "AFL-CIO Affiliated Unions"). Finally, both the Board and the Circuit Courts have concluded that such an agreement need not be related to a specific jobsite but may cover multiple jobsites as long as it arises out of a collective bargaining relationship *or* is intended to eliminate jobsite friction which may result from union employees being required to working alongside nonunion employees.

In sum, these two Circuit Courts and the Board have sanctioned the use of restrictive subcontracting agreements as massive top-down organizing weapons. The following example illustrates the potential effects of these decisions. Assume, as above, that the Laborers Union has a bargaining relationship with a general contractor and obtains an agreement restricting subcontracting only to firms who have AFL-CIO agreements covering all of their jobs. Assume that the general contractor is performing five jobs and employs five different subcontractors on each job. Because the restrictive subcontracting clause in question arises from a collective bargaining relationship and because the Board and Circuits have concluded that this standard alone is enough to privilege such an agreement, each of the 25 subcontractors will be required to sign AFL-CIO contracts that cover not only their work on the job being performed for this general contractor, but which covers all of their other work as well. Assume further that these 25 subcontractors are working on two other jobs each and that the union with whom each has an agreement seeks from each of the 50 general contractors an agreement restricting all work on those jobs to only AFL-CIO firms in order to protect their union members from having to work alongside nonunion labor on those jobs. If each of those 50 jobs employed four other subcontractors, then 250 more collective bargaining units (including only one

each for each of the general contractors) would be required to be unionized. And that result would be lawful under the Board's and Circuits' decisions because the unions involved, although having no collective bargaining relationships with the 50 general contractors, would meet the alternative requirement for legality — an agreement to protect their members from being required to work alongside nonunion members. Accordingly, the potential effect of one restrictive subcontracting agreement negotiated with one general contractor is the unionization of 325 units of employees, all by AFL-CIO unions.[19]

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[19] The 325 units referred to in the hypothetical above include the initial 25 subcontracting units on the general contractor's jobs, the other 50 units of those subcontractors employed on other jobs, the 50 general contractors whose employees will be required to be covered by AFL-CIO contracts, and the additional 200 subcontractors working for those general contractors whose firms will be required to sign agreements with the AFL-CIO unions.

These hypothetical figures do not, of course represent reality. Rather they are used merely to compare the relative top-down organizing potential of two different interpretations of this Court's *Connell* decision. Thus, for example, if the Board and Circuits are correct and an 8(e) proviso clause need not be limited to a specific job site, then many (if not most) restrictive subcontracting clauses will be negotiated with multi-employer associations, and will bind many general contractors, not just one. Indeed, that is what happened in the instant case. See *Operating Engineers, Local 701*, 239 NLRB 274, 275 (1978) *enforced sub nom Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065 (9th Cir. 1981). Accordingly, the top-down organizing potential of such clauses will be substantially broadened. On the other hand, it is likely that each subcontractor in an area will be working on more than one job for a single general contractor, or that two or more subcontractors on one job will also be working side-by-side on other jobs. Thus, the top-down organizing potential of a single restrictive subcontracting clause with one general contractor will not be as great, as a practical matter, as the potential set forth in the text above.

CONCLUSION

In sum, the decision of the Ninth Circuit presented in this case for review could not possibly endure under this Court's analysis of Congress' desire to limit top-down organizing in the construction industry by the use of restrictive subcontracting clauses. The Ninth Circuit's decision, as long as it is allowed to stand, can result in disastrous labor and antitrust consequences for construction industry employers, particularly constuction industry general contractors. Further, thousands of non-union employees in the construction industry throughout the country may be subjected to union representation which they do not desire.

Based on the foregoing, The Associated General Contractors of America, Inc. respectfully submits that the petition for writ of certiorari in this case should be granted to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petitioner in No. 80-1808 on a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 17, 1981.

INTEREST OF THE AMICUS CURIAE[1]

The Associated General Contractors of America, Inc. is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, in-

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36 (2). Letters of consent are on file with the Clerk of this Court.

cluding approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry, including the filing of a brief *amicus curiae* with the Ninth Circuit in the case now before this Court.

The specific question presented by this case is whether the partial *en banc* panel of the Court of Appeals for the Ninth Circuit erred in concluding that the construction industry proviso to Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) protects any restrictive subcontractor clause agreed to in a "collective bargaining relationship" notwithstanding that the clause allows substantial "top-down" organizing without avoiding jobsite friction between union and non-union workers.

A reversal of the Ninth Circuit decision is particularly vital to the interests of the AGC, its members and their employees. The employees of many AGC members are represented by building and construction trades unions who constantly seek agreement upon restrictive subcontracting clauses. Inded, almost all such restrictive sub-

contracting clauses in the construction industry are sought by unions from general contractors, rather than from subcontractors, and AGC's general contractor members number approximately 80% of the construction general contractors in the country. Until the Ninth Circuit is reversed, the employees of AGC members and their subcontractors will remain subject to "top-down" organizing pressures by construction unions which deny employees the right to choose whether or not they desire union representation.

SUMMARY OF ARGUMENT

This case and its companion[2] deal with the legality of restrictive subcontracting agreements negotiated as part of a collective bargaining agreement between a construction contractor and a union which limits the contractor's right to subcontract construction site work on all his jobs to only subcontractors who have agreements with certain specified unions.

This *amicus* contends that such clauses violate Section 8(e) of the National Labor Relations Act ("NLRA") (29 U.S.C. § 158(e)) unless they meet all of the requirements of the so-called construction industry proviso to that Section (§ 8(e)). According to this Court in its *Connell* decision[3] those requirements are:[4]

1. The agreement must arise in the context of a collective bargaining relationship between the construction contractor and the union, *and*

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[2] *Woelke & Romero Framing, Inc., v. N.L.R.B.*, No. 80-1798.

[3] *Connell Construction Co. v. Plumbers and Steamfitters*, 421 U.S. 616 (1975).

[4] The statute makes clear that a legal construction restrictive subcontracting agreement must be between a union and an employer in the construction industry and must be limited to on-site construction work. (§ 8(e), first proviso). The additional requirements for legality were set forth by this Court in *Connell* in order to carry out Congress' desire that the § 8(e) proviso be harmonized with the rest of the National Labor Relations Act.

2. The agreement must be limited to a specific job site in the sense that:
   a. It must cover only one job of the agreeing contractor and
   b. It may not require that any subcontractor be signatory to an agreement on other than the single job site of the agreeing contractor, *and*
3. The agreement must be designed to meet the basic purpose of the § 8(e) construction industry proviso which is to avoid job site tensions likely to occur when union and non-union employees work side-by-side on a single construction project.[5]

Those requirements are the product of this Court's careful accommodation of two seemingly conflicting Congressional desires. Thus, in *Connell*, this Court recognized that agreements restricting subcontracting only to union firms allows unions to engage in "top-down" organizing by requiring that a subcontractor recognize a union as a representative of its employees regardless of the desires of those employees. This Court further recognized that such "top-down" organizing was in direct conflict with the basic purpose of the NLRA which is to protect employee free choice in choosing or declining to choose a Union representative. On the other hand, Congress had legislated the 8(e) proviso which allowed at least some restricted subcontracting in the construction industry.

In *Connell* this Court had to decide the extent to which Congress intended that the construction industry was to be exempt from the basic labor policy of the country—the policy of employee free choice. To decide

[5] The purpose of the construction industry proviso to § 8(e) is met by requiring that all employees on a single job site be union represented. It is not necessary that the agreement require that employees be represented by any particular union or unions, and, to so require does violence to other important NLRA policies.

that issue this Court looked for the reason behind Congress' enactment of the § 8(e) proviso and found that Congress was concerned that job site friction might arise on a particular construction site if union members were employed by a contractor with whom that union had a collective bargaining relationship and were to work side-by-side with non-union employees. To meet that concern this Court found that Congress had intended to allow construction employers and unions, as part of their bargaining relationship, to enter into an agreement covering a particular job site which would insure that all employees on that job were union represented. And absent any clear statement from Congress that it intended to go any further in eliminating employee choice, this Court properly concluded that Congress had privileged only those restrictive subcontracting agreements which were limited to meeting the problem envisioned by Congress.

But the National Labor Relations Board ("NLRB") and two Circuit Courts have disagreed[6] and have held that construction industry restrictive subcontracting agreements are lawful under the § 8(e) proviso if:

1. The agreement arises out of a collective bargaining relationship *or*
2. The agreement requires that all employees on the job be union represented,

and such an agreement is lawful:

1. Even if the agreement covers multiple job sites, including future sites, and
2. Even if the agreement requires that a subcontractor sign union agreements covering all its work on all job sites, and

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[6] *Woelke & Romero Framing, Inc.*, 239 NLRB 241 (1978); *Utilities Serv. Engineering, Inc.*, 239 NLRB 253 (1978); *Sullivan-Kelly & Associates*, 239 NLRB 264 (1978); *Pacific Northwest-ABC*, 239 NLRB 274 (1978); *Donald Shriver, Inc. v. N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, —— U.S. ——, 49 USLW 3825 (1981); *Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065 (9th Cir. 1981).

3. Even if the agreement requires that a subcontractor sign an agreement with a specific union (e.g., "an AFL-CIO union").

Because the NLRB and those courts have misinterpreted this Court's *Connell* decision, and by so doing have sanctioned the use of restrictive subcontracting agreements as massive "top-down" organizing tools for construction unions, we respectfully urge this Court to reverse the decision in this case.

ARGUMENT

IN ORDER PROPERLY TO ACCOMMODATE THE NATIONAL POLICY FAVORING EMPLOYEE FREE CHOICE IN THE SELECTION OR REJECTION OF A UNION REPRESENTATIVE, A VALID CONSTRUCTION INDUSTRY RESTRICTIVE SUBCONTRACTING AGREEMENT MUST BE LIMITED TO A COLLECTIVELY BARGAINED AGREEMENT WHICH ALLEVIATES JOB SITE FRICTION BETWEEN UNION AND NON-UNION WORKERS ON A SINGLE JOB SITE.

Although restrictive subcontracting clauses in the construction industry vary from one labor-management agreement to another, the kind of clauses involved in the cases before this Court have a common theme: they commit the general construction contractor to subcontract no on-site construction work to any subcontractor unless that subcontractor's employees are covered by a union contract. Such clauses are normally called "union signatory" clauses, and violate Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) unless they meet the requirements of the so-called "construction industry proviso" in Section 8(e). E.g., *Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065, 2069 (9th Cir. 1981). Whether or not the *proviso* requirements are met depends upon how this Court's decision in *Connell* is read and interpreted—and that is the issue in the instant case.

In dealing with this issue, it is important to understand, as the *Connell* Court did, that restrictive subcontracting agreements can and are used by construction unions as "top-down" organizing tools. "Top-down" organizing is a term which generally describes union efforts to gain new members by requiring an employer to recognize the union as the representative of his employees, thereby unionizing those employees regardless of their wishes. Restrictive subcontracting clauses have this "top-down" organizing effect because they require that subcontractor-employers recognize a union as the representative of their employees.

It is also important to remember, when judging how far Congress intended to go in allowing such restrictive agreements, that the basic purpose of the NLRA has always been to protect the right of employees freely to choose or reject union representation—a purpose which is hardly fostered by widespread approval of "top-down" organizing.

As we show below, the *Connell* Court understood the delicate balance required by competing Congressional desires and concluded that Congress intended to approve only those restrictive subcontracting agreements which were necessary to meet the construction industry problem it saw—the possibility that friction may occur on a job site if union members employed by a contractor with a bargaining relationship with their union were to work beside non-union employees on that job. The Ninth Circuit in this case misconstrued this Court's *Connell* decision by improperly broadening the scope of the 8(e) construction proviso beyond the limits intended by Congress. Accordingly, this Court should reverse.

a. The Avoidance Of "Top-Down" Organizing To The Fullest Extent Possible Is Paramount To The Scheme Of The Act.

The ruling below failed to recognize that the construction proviso to Section 8(e) must be read within the context of the entire NLRA and in light of the objectives

Congress intended to achieve by its enactment.[7] And the Circuit thereby failed adequately to consider the central theme which permeates the Act—the protection of the right of employees to bargain collectively through representatives of their own choosing, or to refrain from such activity.[8]

Indeed, the very 1959 amendments which added the 8(e) proviso to the NLRA specifically reinforced the Act's policy in favor of free employee choice and against "top-down" organizing by establishing "careful limits on the economic pressure unions may use in the aid of their organizational campaign." *Connell*, 421 U.S. at 633. Accordingly, Section 8(b)(7) limited the use of recognitional picketing and provided for elections to determine if employees desired union representation.[9] While Sec-

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[7] "It is a familiar rule that a thing may be within the letter of the statute but yet not within the statute, because not within its spirit, nor within the intention of its makers." *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 619 (1967).

[8] Section 7 of the Act provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities. . . .*" (Emphasis added.)

[9] As this Court stated in *NLRB v. Iron Workers (Higden Construction Co.)*, 434 U.S. at 346-347):

> As for Section 8(b)(7), which, along with Section 8(f), was added in 1959, its major purpose was to implement one of the Act's principal goals—to ensure that employees were free to make an uncoerced choice of bargaining agent. As we recognized in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Id.*, at 632 and references cited therein.

tion 8(f) permits construction contractors to recognize a union before it has actually attained majority status, such agreements may be challenged in a representation election to preserve the employees' right to select or decline representation. Indeed, in *N.L.R.B. v. Iron Workers (Higden Construction Co.)*, 434 U.S. 335 (1978), this Court stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry," for "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being establish to the majority principle" (434 U.S. at 347-348, n. 10).

Therefore, Congress could not have intended that Section 8(e) construction proviso agreements be used by unions for wholesale organizing purposes because that would be counter to the basic policy of the NLRA and undo for the construction industry the carefully developed policy reflected by Sections 8(b)(7) and 8(f) of the Act.

However, it is clear from those 1959 amendments that Congress did intend to legalize certain subcontracting agreements in the construction industry despite their organizational impact, but the issue remains: What agreements did Congress intend to legalize and what agreements were to be illegal?

The answer to that critical issue is found in the Congressional debates preceding the enactment of Section 8(e) where concerns were expressed about "the frictions that arise when Union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. N.L.R.B.*, 361 F.2d 547, 557 (D.C. Cir. 1966). And this Court in *Connell* found that those Congressional concerns were intended by Congress to be met by a clause arising out of a collective bargaining relationship, which is limited to a specific

job site and which requires that when members of the agreeing union are working on the site all other employees on that site must be unionized. Any broader clause goes beyond Congress' concern and, thus, unnecessarily and impermissibly destroys employee free choice.

b. The Subcontracting Agreement Must Arise From A Collective Bargaining Relationship.

The *Connell* Court concluded that a valid subcontracting clause must be entered into in the context of a collective bargaining relationship. And for good reason. Given the "top-down" organizing potential of subcontracting agreements and absent a clear statement by Congress that it intended such agreements to be entered into and enforced outside the context of a bargaining relationship, it should not be presumed that Congress intended to validate agreements between stranger employers and unions. This conclusion is particularly true because the Section 8(e) proviso is found in a statute which clearly contemplates that labor-management agreements will be reached in the context of a bargaining relationship. Further, if the union and the employer are in fact "strangers," the union's reason for seeking the subcontracting agreement is to gain representation rights over other employees, rather than the protection of the legitimate interests of those employees whom it already represents. And no one contends that Congress' purpose in enacting the 8(e) proviso was to specifically grant to construction unions a "top down" organizing weapon which serves no other purpose.

Even the NLRB and the Circuits which have considered this issue agree that the first inquiry in determining the validity of a restrictive subcontracting clause must be whether it arose from a collective bargaining relationship. The problem with the NLRB and Circuits, however, is that they would find such a clause to be legal if it arises out of a bargaining relationship without considering whether it is restricted to a specific job or whether it meets the purpose of the proviso—to reduce

job site friction arising from union employees working side-by-side with non-union workers. And the NLRB and Circuits compound their error by further suggesting that even if the restrictive subcontracting agreement does not arise from a collective bargaining relationship, it is still lawful if it meets the "side-by-side" purpose of the 8(e) proviso even though it is not limited to a specific job site.[10] In so holding, the NLRB and Circuits simply disregarded this Court's description of the clause found to be illegal in *Connell* (421 U.S. at 631):

> Local 100 does not suggest that its subcontracting agreement is related to any of these policies. It does not claim to be protecting Connell's employees from *having to work alongside non-union men.* The agreement apparently was not designed to protect Local 100's members in that regard, since it was *not limited to jobsites on which they were working.* [Emphasis added.]

What this Court said in Connell was that *all* three of the above noted requirements—(1) a bargaining relationship, (2) a specific job and (3) protecting union workers from working side-by-side with non-union workers—must be met in order for a restrictive subcontracting clause to be valid under the construction industry

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[10] The conclusion of the NLRB and Circuits that a collective bargaining relationship need not exist when a union seeks the subcontracting clause to protect its members from working alongside non-union workers has the effect of totally reversing this Court's decision in *Denver Building Trades (N.L.R.B. v. Denver Building Trades,* 341 U.S. 675 (1951)), which Congress declined to do when it enacted the 8(e) proviso (*Connell,* 421 U.S. at 630) and has consistently declined to do in rejecting so-called "Common Situs Picketing" legislation. See Nash, *Common Situs Picketing—Why the Uproar?* 2 Employee Relations Law Journal 24 (Summer 1976). Thus, any union representing a subcontractor's employees on a job site could picket the general contractor to obtain an agreement that he will remove all non-union subcontractors from his job site even though that union has no bargaining relationship with the contractor.

proviso.[11] Indeed, only a clause meeting all of these requirements will both fulfill the purpose of the 8(e) proviso, and, at the same time, accommodate Congress' concern that such clauses not be used as massive "top-down" organizing weapons which unduly and unnecessarily impinge upon the rights of employees to select whether or not they wish to be represented by a labor organization.[12]

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[11] Responding to the controversy over whether the requirements of *Connell* are to be read in the conjunctive or disjunctive, commentator Leonard S. Janofsky concluded that both conditions must be met:

> "Taking the rationale of *Connell*, it seems to me that the 'all jobsites' aspect of the clause goes too far. First, such a broad reach, even in the context of a collective bargaining agreement, presents exactly the same 'top-down' organizing evil which *Connell* condemned. Second, such an 'all jobsites' clause, even as part of a collective bargaining agreement, at least potentially goes well beyond what has been recognized as a union's legitimate concern against having its members working side-by-side with non-union workers." (Janofsky & May, *Connell—Consistent with Past, Indicative of Future*, Proceedings of the New York University, 29th Annual Conference on Labor, 1976.)

See also Nash, *Connell "Hot Cargo" Agreements: The Supreme Court as Interpreted by the NLRB*, 83 Dickinson L. Rev. 661 (1979).

[12] The NLRB General Counsel initially concluded that clauses agreed upon in a collective bargaining relationship that extend to job sites where the signatory contractor does not employ members of his own, are "broader than required by the union's legitimate interests" and therefore, "are not within the scope of the proviso." *NLRB General Counsel's Memorandum on Connell*, 1976 Lab. Rel. Yearbook 295 (BNA, 1977). Moreover, several district courts have found that a collective bargaining relationship in itself is insufficient to validate an overly broad subcontracting clause. A number of courts have interpreted *Connell* to mean that even agreements arrived at within a bargaining relationship must also meet additional requirements to be protected by the 8(e) proviso. *Long v. Floorcraft Carpet Co.*, (not officially reported) 95 LRRM 3134 (D.Ore. 1977); *Long v. Pam's Carpet Service, Inc.*, (not officially reported) 95 LRRM 3145 (D.Ore. 1977), *Operating Engineers v. Neilsen & Co.*, (not officially reported) 92 LRRM 2861 (D.Id.

Thus, even though the subcontracting clause in this case arose from a collective bargaining relationship, it is not protected from illegality unless it meets the remaining requirements of the 8(e) construction proviso.

c. The Subcontracting Agreement Must Be Intended To Protect The Agreeing Union's Members From Working Side-By-Side With Non-Union Workers.

Again recognizing Congress' established desire that restrictive subcontracting clauses not be given such a broad effect that they create too large a loophole in the Congressional limitation of "top-down" organizing tactics, this Court held in *Connell* that the construction proviso was intended to protect subcontracting agreements only to the extent that they protect the agreeing union's members from having to work alongside non-union employees on a specific job site.[13] That was the problem the Con-

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1975); *Waggoner v. McGray, Inc.*, 432 F.Supp. 580, 583 (C.D.Cal. 1977). See also *NLRB v. International Union of Operating Engineers, Local 542*, 543 F.2d 802, 906-07 (3rd Cir. 1976).

[13] The Court below suggested that Congress may have intended that the 8(e) proviso further another construction union objective in addition to protecting union members from working beside non-union employees. And that objective was to allow restrictive subcontracting agreements in order that the agreeing union might protect the wage levels and economic benefits it had negotiated for its members. E.g., 107 LRRM at 2076, 2080. However, it is doubtful that the Ninth Circuit is correct, and even if it is, it makes no difference in the analysis or outcome of this case. First, this Court in *Connell* found that the 8(e) proviso was intended to protect against job site friction between union and non-union workers—not to protect negotiated wages and benefits. 421 U.S. at 630-31. That holding is consistent with the legislative history surrounding enactment of the 8(e) proviso, for, as the dissent below points out, very little was said in Congressional debates about the need for construction unions to protect wage and benefit levels by means of restrictive subcontracting agreements (107 LRRM at 2083) and even the few comments to that effect were made in favor of a proposal which would have overruled this Court's *Denver Building Trades* decision (341 U.S. 675), a proposal which was not

gress was addressing when it enacted the 8(e) proviso, and, again, absent a clear statement by Congress that it intended to legalize "top-down" organizing beyond that necessary to meet the needs of construction unions it was addressing, it can not be presumed that Congress intended to legalize broader subcontracting agreements. (421 U.S. at 431).

To accomplish this purpose, a union may seek to be party to a restrictive agreement only with regard to specific jobs where its members will be working. In other words, its members have to be on the job to warrant the protection of the proviso.[14] Further, the clause

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enacted by Congress. *Connell*, 421 U.S. at 629 n. 8. Second, even if Congress had intended that the 8(e) proviso would privilege agreements designed to protect negotiated wages and benefits, its intent has been fulfilled, for the NLRB and Courts in the mid-1960's began to uphold such "union standards" agreements (previously thought to be unlawful) as lawful primary agreements. E.g., *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). But such agreements bear no relationship to the kind of agreement under review in this case, for a lawful union standards agreement may only restrict the subcontracting of work historically performed by the agreeing union's members and then only to a firm that pays equivalent wages and benefits—it may not restrict subcontracting of the work of other employees and it may not require that a subcontractor sign a union agreement. E.g., *Truck Drivers Union Local No. 413 v. N.L.R.B.*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). Such agreements, of course, do not restrict employee free choice for they do not require a subcontractor to recognize any union as the representative of its employees. As a consequence, no balancing of that basic statutory right is necessary and such agreements need not be limited to any particular job in order to meet Congress' desire to limit "top-down" organizing.

[14] Nowhere in the *Connell* decision is it suggested that the union party to the restrictive subcontracting agreement has any legitimate interest in protecting members of other unions from being required to work beside non-union employees. In fact, *Connell* found that Congress limited the purpose of the Section 8(e) proviso to the protection of members of the union seeking the agreement. "The agreement apparently was not designed to protect Local 100's mem-

must require that all other employees of the general contractor and all subcontractors be union represented, for only in that way will the agreeing union's members be protected from non-union employees on the job.

The subcontracting clause involved in the present case suffers from the very same deficiencies as the virtually identical clause considered in *Connell*. Both clauses involved an agreement that required subcontracting of the work within the agreeing unions' jurisdiction only to subcontractors that were signatory to agreements with the particular unions. And both clauses are illegal under § 8(e) because they do not insure that all other employees on the common job site will be union and accordingly, are outside the shelter of the construction proviso.

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bers. . . ." 421 U.S. at 631. Therefore, the union's object must be to protect its members, not union members generally.

The Ninth Circuit suggests that such a requirement will create insurmountable practical problems for construction unions because they will be required to police every job site to determine whether their members are working and thus require the protection of the subcontracting clause. But there is no reason why the union's members can't simply tell their union when they are on the job. Indeed, most will probably be referred from a union hiring hall in any event, thereby alerting the union to their presence on the job site. Further, there is no reason to suspect that the Board and Courts will rigidly require that the union's members be on the job every hour of every day in order for the restrictive subcontracting clause to be enforced. Thus, for example, in determining whether a union may picket a common site because of the presence of the contractor on the job with whom the union has a dispute, the Board has held that the temporary absence of the contractor or his employees from the job site does not, itself, transform an otherwise lawful picket line into an unlawful secondary boycott. *Local 3, IBEW (New Power Wire and Electric Corp.)* 144 NLRB 1089 (1963), *enforced in pertinent part*, 340 F.2d 71 (2d Cir. 1965); *Kolodziej v. Local 697, IBEW*, —— F.Supp. ——, 92 LRRM 3537 (N.D.Ind. 1975), *aff'd*, 535 F.2d 1257 (7th Cir.), *cert. denied* 429 U.S. 857 (1976); *Electrical Workers, Local 861 (Plauche Electric, Inc.)*, 135 NLRB 250 (1962).

Further, the *Connell* Court properly found that the Congressional purpose behind the 8(e) proviso was to protect union members from working alongside non-union members. Never did Congress evidence an intent to allow one union to dictate any particular union that a subcontractor's employees must join. Thus, any subcontracting agreement which seeks to specify particular unions with whom subcontractors must have an agreement (as did the restrictive agreement in this case) fails to meet the requirements of the proviso and violates § 8(e).

Passages throughout the *Connell* opinion (as well as the oft-stated Congressional objective of limiting the use of subcontracting agreements as organizational weapons) support this view. Thus, this Court noted: "The agreements with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that *did not have a contract with Local 100.*" 421 U.S. at 624 (emphasis added). Further, this Court's discussion of the proviso's purpose deals with the interest of union employees working next to other union employees and nowhere mentions any legitimate need to specify the union alongside whom their members must work.

Further, this Court in note 8 suggests that in enacting the Section 8(e) proviso, Congress intended simply to preserve the *status quo* under *Local 1976, Carpenters v. N.L.R.B.* (*Sand Door*), 357 U.S. 93 (1958). In *Sand Door*, this Court was dealing with a restrictive clause providing that "workmen shall not be required to handle non-union material" (as well as with a clause directed at an "unfair company"). *Id.* at 95, 97. Although the *Sand Door* Court did not consider the validity of such a clause, and, thus, presumably considered it legal for its purposes, it clearly was dealing with a general "non-union" clause and not one specifying any particular union. Therefore, to the extent that the *status quo* under *Sand Door* was intended to be maintained by

the Section 8(e) proviso, only such general clauses would be legitimate under the proviso.[15]

Finally, where Congress has indicated no special desire to privilege restrictive subcontracting agreements that specify a particular union or unions that must represent employees on the job site, this Court should not presume that such an agreement was intended to be made lawful by the 8(e) proviso. Such a restriction would not only require that employees be union represented (which, of course, is the effect of even a valid 8(e) proviso agreement) but it would further restrict their basic right under the NLRA to select which union they wished to represent them. Further, employees who have previously elected a union of their choice ought not to be frozen from the market place for doing so, and their employer ought not to be precluded from obtaining work because its employees have exercised their statutory right to select a union of their choice to represent them.

In sum, the clause in the present case violates Section 8(e) because it does not protect the union's members from working side-by-side with non-union workers and because it specifies a particular union that must represent employees of a subcontractor performing part of the work on the job site.

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[15] It might be argued that this construction of the Court's opinion in *Connell* is contrary to the implicit holdings in cases such as *Essex County & Vicinity District Council of Carpenters v. N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964), and *Dallas Building & Construction Trades Council v. N.L.R.B.*, 396 F.2d 677 (D.C. Cir. 1968), which upheld, as protected by the Section 8(e) proviso, agreements which provided that work done by others than members of the union signatory to the agreement with the contractor must be done only by firms signatory to agreements with specific unions (*Essex*—"a union affiliated with the Building Trades Department of the AFL-CIO"; *Dallas*—"agreements with the appropriate Council-affiliated Local"). However, the courts' opinions in those cases do not reveal that it was argued that such clauses were invalid because they were so limited to specific unions. Further, to the extent that *Connell* is inconsistent with those earlier lower court opinions, they would be implicitly overruled on this point.

d. The Subcontracting Restriction Must Be Limited To A Particular Job Site.

The *Connell* Court also found that Congress had intended a further limitation on the restrictive subcontracting agreements. Thus, even though a lawful agreement must arise from a collective bargaining relationship, and even though it must be limited to ensuring that all employees on a construction site are union represented, still the subcontracting agreement would have massive "top-down" organizing potential because unions would be free to "enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some job site somewhere." 421 U.S. at 631-32. In light of Congress' express desire to limit organizational and recognitional economic weapons, this Court concluded that Congress could not have intended such a result.

This Court then looked again to determine what problem Congress sought to correct with its 8(e) proviso, and concluded that Congress had sought to provide some relief to construction unions from the decision in the *Denver Building Trades* case (341 U.S. 675 (1951)). The *Denver Building Trades* case had found union picketing of a single multi-employer site to be illegal where the union sought the removal of a non-union subcontractor from that site only. As made clear by the dissent of Justice Douglas (341 U.S. at 692):

> The Union was not pursuing the contractor to other jobs. All the Union asked was that union men not be compelled to work alongside non-union men on the same job. As Judge Rifkind stated in an analogous case, "the Union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."[16]

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[16] Quoting *Douds v. Metropolitan Fed'n*, 75 F. Supp. 672, 677 (S.D.N.Y., 1948) (footnote omitted).

Thus, the *Denver Building Trades* problem with which the Congress was dealing was limited in scope. And Congress appropriately dealt with it in a limited manner by "limit[ing] the construction industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on *a* job site." 421 U.S. at 630 (emphasis added).[17]

Further, the *Denver Building Trades* case had not involved any effort by the union to affect the subcontractor's union or non-union status on other than the single job being picketed, and there is no reason to believe that Congress intended any such result. Indeed, even Justice Douglas' dissent in *Denver Building Trades* implied that union pressure on other jobs of the subcontractor would have been improper. Thus, Congress must have intended not only that restrictive agreements be limited to a single specific construction project but, further, that a union and general contractor could not agree to compel a subcontractor to become signatory to a union contract in regard to any work of that subcontractor other than on the specific job site covered by the subcontracting agreement. Therefore, the subcontracting agreement in the case now before this Court violates Section 8(e) for it extends to all of the agreeing contractors' jobs and re-

[17] The Ninth Circuit supports its contrary conclusion to the effect that general subcontracting agreements may be negotiated covering multi-projects by alluding to alleged practical problems with this Court's requirement that the agreement be limited to a specific job site. Thus, according to the Ninth Circuit a union would have to constantly search out jobs of the general contractor and then go to all the trouble of negotiating a separate subcontracting agreement for each site. But the Court overlooks the fact that a union may only negotiate the subcontracting agreement on jobs where its members will be working. Even if those members are not referred to the job by the union's hiring hall (which will be the normal case and which will clearly give the union notice of the contractor's job), it is reasonable to assume that those union members who are concerned about working next to non-union workers will alert their union. Further, it is reasonable to assume that construction unions now have, or will promptly develop, standard subcontracting clauses which can quickly and easily be accomodated to each job.

quires subcontracting to only a totally union subcontractor.

e. The Failure By The Ninth Circuit And The NLRB To Recognize The Restrictions Intended By Congress On A Legal Subcontracting Agreement Allows The Use Of Such Agreements As Massive "Top-Down" Organizing Weapons.

To briefly summarize, this Court held in *Connell* that Congress had limited the legality of restrictive subcontracting agreements in order to retain, to the fullest extent possible, the right of construction industry employees to select or reject union representation of their own choosing. Congress did so by requiring that the agreement be negotiated in the context of a collective bargaining relationship, by requiring that the agreement be limited to a single job site and by requiring that the agreement meet the purpose which Congress had intended—to prevent possible job site friction that might occur if union workers worked alongside non-union workers. The NLRB and Ninth and D.C. Circuits[18] have disagreed by holding that a restrictive subcontracting agreement is lawful either if it arises out of a bargaining relationship or it seeks to prevent job site friction, and the agreement remains lawful even if it covers multiple job sites, even if it requires a subcontractor to be unionized on all his jobs and even if it requires that the subcontractor sign agreements with specific unions.[19]

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[18] See note 6, *supra*.

[19] The Ninth Circuit sought support for its conclusion that a collective bargaining relationship was enough to validate an 8(e) proviso agreement by suggesting that it was only the absence of such a relationship that compelled this Court to find the clause in *Connell* unlawful. The Circuit reasoned that it was necessary for this Court to find the subcontracting clause in *Connell* illegal, otherwise the union would have been free to engage in coercive picketing without end because the picketing was not subject to the

The following examples illustrate the "top-down" organizing potential of this Court's analysis as compared to that of the NLRB and Ninth Circuit:

This Court's Connell Analysis.—Assume the Laborers Union has a collective bargaining relationship with a general contractor and obtains agreement upon a clause restricting subcontracting on one particular job where Laborers Union members will be working for subcontractors who have union contracts. Assume that five subcontractors are hired by the general contractor and all of those subcontractors sign collective bargaining agreements with unions. The original restrictive subcontracting clause would be lawful if it was bargained in the context of a collective bargaining relationship, it related only to a particular job, and it met the purpose of the Section 8(e) proviso by protecting unionized laborers who would be working on that job from having to work alongside any non-union labor. In addition, however, the restrictive subcontracting clause in this hypothetical could not be used as a massive organizing weapon. Each of the subcontractors on the job were required to sign a union contract covering only that job. The restrictive subcontracting clause in this hypothetical did not require that those subcontractors sign an agreement with any par-

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strictures of Section 8(b)(7) inasmuch as the union in *Connell* disclaimed any interest in representing Connell's employees. But this analysis was not the basis for this Court's *Connell* decision, and for good reason. It is simply not true that § 8(b)(7) does not apply in these circumstances. Where a union pickets a general contractor to obtain an 8(e) proviso agreement and that contractor has its own employees who could perform the work covered by the proviso agreement, then the union's picketing violates 8(b)(7) whether or not the union seeks to represent the contractor's employees. *Building Construction Trades Council of Delaware (Pettinaro Construction Co.)*, 230 NLRB 42 (1977); See also *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemose Construction Co.)*, 222 NLRB 1276 (1976); *N.L.R.B. v. International Brotherhood of Electrical Workers, Local 265 (R P & M Electric)*, 604 F.2d 1091 (8th Cir. 1979).

ticular union, thereby leaving the employees of these subcontractors some choice regarding which union they wished to represent them. The net result is that, at most, five employee units of non-union subcontractors would be covered by union agreements, with the employees having a choice of representative.

The NLRB's and Circuit Courts' Analyses.—Assume, as above, that the Laborers Union has a bargaining relationship with a general contractor and obtains an agreement restricting subcontracting on all its jobs to only firms who have AFL-CIO agreements covering all of their jobs. Assume that the general contractor is performing five jobs and employs five different subcontractors on each job. Because the restrictive subcontracting clause in question arises from a collective bargaining relationship and because the Board and Circuits have concluded that this alone is enough to privilege such an agreement, each of the 25 subcontractors will be required to sign AFL-CIO contracts that cover not only their work on the job being performed for this general contractor, but which covers all of their other work as well. Assume further that these 25 subcontractors are working on two other jobs each and that the union with whom each has an agreement seeks from each of the 50 general contractors an agreement restricting all work on those jobs to only AFL-CIO firms in order to protect their union members from having to work alongside non-union labor on those jobs. If each of those 50 jobs employed four other subcontractors, then 250 more collective bargaining units (including only one each for each of the general contractors) would be required to be unionized. And that result would be lawful under the Board's and Circuits' decisions because the unions involved, although having no collective bargaining relationships with the 50 general contractors, would meet the alternative requirement for legality—an agreement to protect their members from being required to work alongside non-union members.

Accordingly, the potential effect of one restrictive subcontracting agreement negotiated with one general contractor is the unionization of 325 units of employees, all by AFL-CIO unions.[20]

As these examples illustrate, the NLRB and the Circuits have simply failed to take into account the Congressional desire to limit the use of construction-industry subcontracting agreements as "top-down" organizing weapons. As a result the decision below must be reversed by this Court.

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[20] The 325 units referred to in the hypothetical above include the initial 25 subcontracting units on the general contractor's jobs, the other 50 units of those subcontractors employed on other jobs, the 50 general contractors whose employees will be required to be covered by AFL-CIO contracts, and the additional 200 subcontractors working for those general contractors whose firms will be required to sign agreements with the AFL-CIO unions.

These hypothetical figures do not, of course, represent reality. Rather they are used merely to compare the relative "top-down" organizing potential of two different interpretations of this Court's *Connell* decision. Thus, for example, if the Board and Circuits are correct and an 8(e) proviso clause need not be limited to a specific job site, then many (if not most) restrictive subcontracting clauses will be negotiated with multi-employer associations, and will bind many general contractors, not just one. Indeed, that is what happened in the instant case. See *Operating Engineers, Local 710*, 239 NLRB 274, 275 (1978), *enforced sub nom. Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065 (9th Cir. 1981). Accordingly, the "top-down" organizing potential of such clauses will be substantially broadened. On the other hand, it is likely that each subcontractor in an area will be working on more than one job for a single general contractor, or that two or more subcontractors on one job will also be working side-by-side on other jobs. Thus, the "top-down" organizing potential of a single restrictive subcontracting clause with one general contractor will not be as great, as a practical matter, as the potential set forth in the text above.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the decision of the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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